Supreme Court, U.S.
FILED

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No. 97-

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1997

GERALD GEE,

Petitioner,

v.

FREDERICK HUMPHRIES, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the First and Fourteenth Amendments protect the speech of a public university professor in his classroom and limit the university's ability to discipline him for such speech?

2. Does the Fourteenth Amendment require a plaintiff to exhaust all possible state judicial remedies before he can bring a claim under 42 U.S.C. § 1983 that he was deprived of property and liberty without due process?

PARTIES TO THE PROCEEDING

The parties to the litigation are:

Plaintiff (Petitioner):

Gerald Gee

Defendants (Respondents):

Frederick Humphries
Bishop Holifield
Carrie Gavin
Nellie Woodruff
Robert Rollins
Richard Hogg
James Heckin, Jr., Elizabeth Lindsay, Audrea Anderson, Julian Bennett, Jr., Frank Brogan, Paul Cejas, Charlton Daniel, Jr., Perla Hantman, Gwendolyn McLin, Jon Moyle, Dennis Ross, Steven Uhlfedler, Welcom Watson, and Cornelia Sha'ron James, in their official capacities as members of the Board of Regents of the State of Florida

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT LAWS 1

STATEMENT OF THE CASE 1

A. Use Of The Word "Nigger" On FAMU's Campus 4

B. The Complaints And The University's Flawed Investigation And Punishment Of Gee 5

C. The Proceedings Below 10

REASONS FOR GRANTING THE WRIT 13

A. This Court Should Grant The Petition To Resolve Important Questions Concerning First Amendment Protection For Professors At State Universities Over Which The Circuit Courts Have Split 14

1. "Public Concern" 15

2. Fair Notice 19

3. Balancing 21

B. This Court Should Grant The Petition To Resolve The Split Between The Circuit Courts Over Whether A Plaintiff Must Exhaust All State Judicial Remedies Before Bringing A Procedural Due Process Claim Under The Fourteenth Amendment 22

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Bell v. City of Demopolis, 86 F.3d 191 (11th Cir. 1996) 24

Berger v. Battaglia, 779 F.2d 992 (4th Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986) 17

Blum v. Schlegel, 18 F.3d 1005 (2d Cir. 1994) . . 16, 22

Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172 (3d Cir. 1990) 20

Brooks v. George County, 84 F.3d 157 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 359 (1996) 26

Burnham v. Ianni, 119 F.3d 668 (8th Cir. 1997) (en banc) 17

Charchenko v. City of Stillwater, 47 F.3d 981 (8th Cir. 1995) 25

Cleveland Bd. of Education v. Loudermill, 470 U.S. 532 (1985) 28

Cohen v. San Bernardino Valley College, 92 F.3d 968 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1290 (1997) 20, 21

Connick v. Myers, 461 U.S. 138 (1983) . . . . . passim.

Cotnoir v. University of Maine System, 35 F.3d 6 (1st Cir. 1994) 25

Cushing v. City of Chicago, 3 F.3d 1156 (7th Cir. 1993) 27

Dambrot v. Central Michigan Univ., 55 F.3d 1177 (6th Cir. 1995) 18

Dambrot v. Central Michigan University, 839 F. Supp. 477 (E.D. Mich. 1993), *aff'd*, 55 F.3d 1177 (6th Cir. 1995) 19

DeAngelis v. El Paso Municipal Police Officers Ass'n, 51 F.3d 591 (5th Cir.), *cert. denied*, 516 U.S. 974 (1995) 13

Dishnow v. School Dist. of Rib Lake, 77 F.3d 194 (7th Cir. 1996) 17

Dwyer v. Regan, 777 F.2d 825 (2nd Cir. 1985) 25

Easter House v. Felder, 910 F.2d 1387 (7th Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991) 26

Edwards v. Aguillard, 482 U.S. 578 (1987) 13

Harris v. Bd. Of Ed. Of The City of Atlanta, 105 F.3d 591 (11th Cir. 1997) 24

Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) 19

Haygood v. Younger, 769 F.2d 1350 (9th Cir. 1985) (en banc), *cert. denied*, 478 U.S. 1020 (1986) . . . 26

Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988) 21

Hosford v. School Committee of Sandwich, 421 Mass. 708, 659 N.E.2d 1178 (1996) 21

Kercado-Melendez v. Aponte-Roque, 829 F.2d 255 (1st Cir. 1987), *cert. denied*, 486 U.S. 1044 (1988) 25

Keyishian v. Board of Regents, 385 U.S. 589 (1967) 20

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 27

Loudermill v. Cleveland Bd. of Education, 721 F.2d 550 (6th Cir. 1983), *aff'd*, 470 U.S. 532 (1985) 25, 29

Martin v. Guillot, 875 F.2d 839 (11th Cir. 1989) . . . 23

Martin v. Parrish, 805 F.2d 583 (5th Cir. 1986) . 16, 18

McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110 (1995) . . . . passim.

Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986) 19

Miles v. Denver Public Schools, 944 F.2d 773 (10th Cir. 1991) 16

Moore v. Board of Education of Johnson City, 134 F.3d 781 (6th Cir. 1998) 25

Nat'l Treasury Employees Union v. United States, 990 F.2d 1271 (D.C. Cir. 1993), *aff'd in part, rev'd in part*, 513 U.S. 454 (1995) . . 15, 17

Parate v. Isibor, 868 F.2d 821 (6th Cir. 1989) 16

Parratt v. Taylor, 451 U.S. 527 (1981), *overruled in part, Daniels v. Williams*, 474 U.S. 327 (1986) . . . . . passim.

Pickering v. Bd. of Ed., 391 U.S. 563 (1968) 21

Plumer v. Maryland, 915 F.2d 927 (4th Cir. 1991) . . 26

Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) 19

Silva v. University of New Hampshire, 888 F. Supp. 293 (D.N.H. 1994) 16, 21

Stachura v. Truszkowski, 763 F.2d 211 (6th Cir. 1985), *rev'd, Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986) 16

Stana v. School Dist. of City of Pittsburgh, 775 F.2d 122 (3d Cir. 1985) 25, 28

Sweezy v. New Hampshire, 354 U.S. 234 (1957) . 14, 15

Tinney v. Shores, 77 F.3d 378 (11th Cir. 1996) 24

Tri County Industries, Inc. v. District of Columbia, 104 F.3d 455 (D.C. Cir. 1997) 26

United States v. Nat'l Treasury Employees Union, 513 U.S. 454 (1995) 15

Ward v. Hickey, 996 F.2d 448 (1st Cir. 1993) 15, 20, 21

Winters v. Board of County Commissioners, 4 F.3d 848 (10th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994) 26

Zinermon v. Burch, 494 U.S. 113 (1990) . . . . . passim.

Constitutional Provisions, Statutes, Rules

42 U.S.C. § 1983 1

Fla. Const. art. I, § 9 29

Section 6C3-10.125, *et seq.*, F.A.C. . . . . passim.

U.S. Const., amend. I . . . . . passim.

U.S. Const., amend. XIV . . . . . passim.

Miscellaneous

Department of Education Office of Civil Rights: Sexual Harassment Guidance, 62 Fed. Reg. 12032 (March 13, 1997) 13

Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 Rutgers L. Rev. 563 (1995) . 13

Kingsley R. Browne, *Workplace Censorship: A Response To Professor Sangree*, 47 Rutgers L. Rev. 579 (1995) 13

Richard A. Hiers, *Academic Freedom In Public Colleges And Universities: O Say Does That Star-Spangled First Amendment Banner Yet Wave?*, 40 Wayne L. Rev. 1 (1993) 22

Suzanne Sangree, *A Reply To Professors Volokh And Browne*, 47 Rutgers L. Rev. 595 (1995) 14

Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment And The First Amendment: No Collision In Sight*, 47 Rutgers L. Rev. 461 (1995) 13

OPINIONS BELOW

The summary affirmance of the United States Court of Appeals for the Eleventh Circuit, filed on April 3, 1998, is reproduced in Appendix ("App.") A.

The December 3, 1996 opinion of the United States District Court for the Northern District of Florida granting defendants summary judgment on plaintiff Gee's claims under 42 U.S.C. § 1983 for violation of his free speech rights under the First and Fourteenth Amendments and for deprivation of property and liberty without due process in violation of the Fourteenth Amendment is reproduced in Appendix B. The final judgment in the district court is reproduced in Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals was entered on April 3, 1998. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT LAWS

United States Constitution, amendment I
United States Constitution, amendment XIV
42 U.S.C. § 1983
Fla. Adm. Code § 6C3-10.125

These provisions are set forth in Appendix D.

STATEMENT OF THE CASE

This case involves a professor who was suspended for two weeks for the content and ideas expressed in an oral communication to his class. This appeal challenges a judgment that affirmed an order granting defendants sum-

mary judgment; accordingly, the facts must be construed in the light most favorable to the plaintiff, Gerald Gee.

Plaintiff Gerald Gee was a non-tenured Assistant Professor at the School of Journalism, Media, and Graphic Arts at Florida A&M University ("FAMU" or the "University"), a historically black institution. As a non-tenured professor, he was employed at FAMU pursuant to a series of nine-month contracts each academic year. R.102, p. 2; R.193, ¶ 6.[1] The case revolves around events that took place in his Public Relations Case Studies (PUR 4001) class on Monday, September 20, 1993. The class normally met on Mondays from 5:45 p.m. to 8:15 p.m. R.83, ¶ 17 & R.87, p. 3.

When Gee entered the classroom that evening, an open conversation among the fourteen African-American students in attendance was taking place concerning whether the University provided sufficient opportunities for Public Relations majors to acquire practical experience. Some students complained that FAMU was not providing Public Relations majors with opportunities for practical experience in the same way that they provided a student-run newspaper for journalism majors and a student-run

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[1] Record references will be in the form R.#, p. # or R.#, ¶ #, where the record refers to the number ascribed to a particular document on the docket of the clerk of the District Court. "Att." refers to an attachment to the referenced document in the record.

Gee had taught at FAMU since 1977. R.193 ¶ 5; R.118-Att., Ex. 1, ¶ 2. In 1983, he was the first educator to receive the Florida Public Relations Association's "President's Award" for "outstanding contributions to the advancement of professionalism in public relations." He is also an ordained Elder in the United Methodist Church. R.6, ¶ 2 & Ex. 1, ¶¶ 4, 5.

radio station for communications majors. R.169-Att., Ex. A, pp. 107-12. After listening for a short while, Gee began to participate, reminding his students that public relations people needed to be "versatile," that they could volunteer on other "outlets" at the University, and that other Public Relations majors had done so. R.102, p. 2 & R.100, ¶ 10; R.6, ¶¶ 2, 4 & Ex. 1 ¶ 16. He also volunteered to assist them in creating a student-run PR firm. App. I4; R.169-Att., Ex. A, pp. 116-18.

As defendants' own investigation later recognized (*see* App. J4), "[i]t was common for the students [in Gee's class] to discuss topics that concerned them, whether those topics were a part of the lecture or not." The issue of opportunities for practical experience in public relations available at FAMU for Public Relations majors was also a matter that was important to Gee and FAMU, one which the University president, Frederick Humphries, had emphasized. R.101-Att., Humphries Dep. 140.

When it became time to start the class, Gee expressed his own opinion. He said the following:

> Now I'm going to say something which may upset some of you, because I'm going to use a term that I, myself, consider offensive. What I'm about to say is *not* directed at any of you, or all of you as a class; it's just something I want you to think about . . .
>
> What I want you to be aware of is that in this day and age, a person can't sit around waiting for someone to give them something. Anyone who doesn't take advantage of the opportunities that are there, or who

> doesn't make opportunities for themselves may be guilty of having what some would call a "nigger mentality" -- the sort of thinking that can keep us all on the back of the bus forever. App. B3.

Gee wanted to impress upon his entire class the "importance of using individual initiative in creating opportunities for practical public relations work" and hoped to convey how important it was for them "to consider their own responsibility for creating such opportunities." R.6, ¶ 4. *See generally* App. I.

A number of students in the class understood Gee's message of self-reliance, and nodded in agreement. App. I9; R.191-Att., Gee Dep. 176-77. Others, as described in more detail below, did not.

A. Use Of The Word "Nigger" On FAMU's Campus

During the years in which Gee taught at FAMU, other professors have used the word "nigger" in various contexts. None of them has been punished. *See* R.191-Att., Miller Aff. ¶ 3 ("I have specifically heard African American Professors use the term 'nigger' in reference to how some white people may perceive African Americans"); R.20, pp. 16-20 (describing specific instance in which professor told his class that they were acting like "niggers"); R.191-Att., Bertolaet Dep. 42-45 (describing various situations in which faculty have used the word "nigger"); Kierstead Dep. 37-40 ("nigger" used by faculty and students alike); Grow Dep. 90-91 & Ex. J thereto, p. 3 (used by faculty); Tucker Dep. 32-33, 46. Books with the word "nigger" in the title, and that used that word

in their text, are part of the curriculum at FAMU. *E.g.*, R.191, Ex. G (reading list for Contemporary Black Theater which includes the play "The Electronic Nigger" by Ed Bullins).

Indeed, defendants below conceded that "[i]t is clear that the word 'nigger,' when used in the proper pedagogical context, is permitted at [FAMU]." R.116, p. 7; R.101-Att., Humphries Dep. 36. Thus, defendants have asserted, it was *not* Gee's use of the word "nigger" that triggered the students' complaints and Gee's eventual punishment:

> The students that complained about [Gee's] remarks of September 20, 1993 did not complain because he used a particular word, in the context of a class lesson, that they found inappropriate. The students complained about the *point*, i.e. the message of [Gee's] speech . . . Thus, the students were not complaining about [Gee's] use of the N-word, they were complaining about the context in which he utilized the word.

R.116, p. 16 (emphasis in original).

B. The Complaints And The University's Flawed Investigation And Punishment Of Gee

Six of the fourteen students in the class that evening of September 20, 1993 subsequently signed a letter, dated September 22, 1993, complaining about Gee's speech, and sent it to various University officials, including President Humphries. (The letter was also signed by a seventh student who was not in Gee's class.) R.100-Att., Ex. A. Shortly thereafter, Alvina Miller, one of the

students in Gee's class on September 20, 1993, circulated a petition supporting Gee and the "choice of his discussion topic." It was signed by more than 50 students. R.100-Att., Ex. B; R.20, pp. 30-31.

After President Humphries concluded that Gee had engaged in "racial harassment," and notified Gee that his contract would not be renewed, Gee filed a grievance pursuant to the Collective Bargaining Agreement ("CBA") between the United Faculty of Florida and the Board of Regents of the State of Florida ("Board"). Eventually, at Step 2 of the grievance process, a representative of the Office of Human Resources of the Board concluded that President Humphries had denied Gee due process because he had failed to follow Section 6C3-10.125(5), F.A.C. (*see* App. D10-D13), which provides procedures for the resolution of claims of discrimination and harassment. R.100-Att., Ex. E. Accordingly, the non-renewal was reversed, and the matter remanded for proceedings consistent with that rule.

Those procedures required that complaints alleging harassment be filed with the "EEO/EEA Officer" in the Equal Opportunity Programs Office at FAMU, *viz.*, Carrie Gavin. On August 9, 1994, Gavin wrote to the seven students who had signed the September 22, 1993 letter, and asked them to press formal charges of racial discrimination in violation of Section 6C3-10.125, F.A.C. against Gee. To facilitate such complaints, Gavin's letter included the official forms on which formal complaints of discrimination and harassment are made. R.100-Att., Ex. G.

Four students did file complaints of racial discrimination with Gavin's office. Although the complainants each had slightly different versions of what transpired on

September 20, 1993, and at least one spoke at length of her distress at hearing Professor Gee's speech, their complaints confirmed the basic context in which Gee spoke, and the substance of what he said. App. E2 ("Gee then informed the class that he was about to say something that may offend some of us"), E6 ("Gee warned the class he would make a statement many might consider offensive . . . Many students told Gee that although his point was understood, his statement was not appreciated"), and E7 (speech occurred during a class discussion in which Gee emphasized that "students needed to go out and find opportunities to enhance their learning experience").

On August 23, 1994, Gavin wrote to Gee to give him "formal notification" of the complaints having been filed with her. App. F. Gavin's August 23 letter did not identify which of the separate paragraphs in the "definitions" of discrimination set forth in Section 6C3-10.-125(2), F.A.C., (App. D3-D6), were at issue. So, too, Gavin did not provide Gee with the complaints themselves, the names of the individuals who had made them, or the number of students who had filed complaints. R.110-Gee St. ¶ 3. When Gee specifically asked for that information (App. G), Gavin falsely asserted that "the University" already had provided it. App. H; R.20, pp. 45-46. Nonetheless, at Gavin's request, Gee submitted a written statement on September 2, 1994. App. I.

Gavin submitted her report to President Humphries along with a cover letter dated October 10, 1994. App. J. The last sentence in Gavin's findings concluded that Gee had violated Section 6C3-10.125. Although her conclusion does not identify under which of the various paragraphs "defining" discrimination and harassment Gee's speech had fallen, App. D3-D6, it does refer to the re-

quirements for a "racially hostile environment." App. J7.

To the extent there were factual differences among the accounts, Gavin "could not take either side" (R.20, p. 48) and did not resolve any disparities between Gee's version and the complainants' version as to what had transpired in class on September 20, 1993, or anything related to Gee's motive or purpose. She believed that such disputes were "minor" and "weren't important," that such disputes "didn't affect the outcome," and that Gee's own version of what took place supported her findings of racial harassment. Rather, Gavin took only what was "common" among the versions. R.20, pp. 47-48; R.101-Att., Gavin Dep. 168-69, 214-16. Thus, Gavin concluded only that Gee had used the word "nigger," and that his use "hindered the educational opportunities" of some of his students. R.20, pp. 40, 48.

Gavin's findings supporting her conclusion were (1) the reactions of the students in class, (2) the reactions of students outside of the class, and the "divisiveness" caused by Gee's remarks as reflected by, *inter alia*, the petition supporting Gee, and (3) the reactions of the faculty, and the divisiveness caused by Gee's remarks as reflected by, *inter alia*, "faculty members writing articles and stating their different opinions in editorials." *See generally* R.101-Att., Gavin Dep. 217-20.

Gavin recommended that Gee be suspended for two weeks without pay. App. J7.

Under Section 6C3-10.125(5)(e), F.A.C., (App. D13-D14) Gavin's report and recommendation was given to President Humphries. President Humphries relied exclusively on Gavin's report in determining Gee's punish-

ment. Although various individuals had previously investigated the matter, President Humphries did not review any prior report. After his initial decision had been overturned, he wanted a "fresh person" to take a "fresh look" at the case. He did not "contrast [Gavin's report] with . . . what had transpired before," and he "went along" with Gavin's recommendation. R.101-Att., Humphries Dep. 170-75; R.133-Ex. A, pp. 177-78, 191-94.

Thus, like Gavin, President Humphries concluded that Gee had engaged in racial harassment and that a two week suspension without pay was an appropriate punishment. R.101-Att., Humphries Dep. 170-75. President Humphries's decision was embodied in his October 24, 1994 letter to Gee, which stated that (1) Gee would be suspended for two weeks without pay, (2) a copy of Gavin's investigative report would be placed in Gee's "evaluation file," and (3) appropriate action would be taken if "future conduct of this nature occurs again." App. K.

The October 24 letter also stated that Gee had ten (10) working days from his receipt of his letter to appeal that decision by appearing before the University Personnel Committee ("UPC"). App. K2. It did not mention any other options to Gee and no one at the University suggested any other options to him. R.110-Gee St. ¶ 4.

Gee timely appealed President Humphries's decision in a letter dated November 9, 1994. App. L. An Investigatory Interview with the UPC was scheduled for November 22, 1994. Prior to that time, Holifield, FAMU's General Counsel, wrote Gee's representative that the hearing would be "informal and not in the nature of an evidentiary hearing," and that "cross-examination and

similar legal procedure" were prohibited. R.118-Att., Ex. 33. In fact, Gee was precluded from bringing any witnesses to the UPC hearing to speak on his behalf. R.191-Att., Gee Dep. 313-17.

President Humphries wrote a letter to Gee on December 2, 1994 stating that the UPC had upheld the discipline he had imposed. App. M. The earlier decision was upheld because Gee had presented no "new evidence" at the non-evidentiary hearing before the UPC. R.110-Rosman St. Ex. D, pp. 212-16.

Section 6C3-10.125(5)(f), F.A.C., (App. D12), states that a party "may appeal to the President for a review of his original decision," and President Humphries's December 2 letter stated that Gee could "appeal this decision with [President Humphries] within twenty (20) working days." App. M1-M2. No other form of appeal was mentioned. On January 9, 1995, Gee timely appealed to President Humphries. App. N.

President Humphries rejected Gee's last appeal in a letter dated January 11, 1995, two days later. App. O. Mailed one day after that, the letter informed Gee that his two week suspension without pay would begin on January 18, 1995 and end at the close of business on January 31, 1995. It mentioned no additional avenues of appeal. In fact, Gee was suspended, and the suspension deprived Gee of salary that he otherwise would have received under the contract for his teaching services.

C. The Proceedings Below

Gee commenced this action in federal court on January 23, 1995, five days after the beginning of his

suspension. R.2. After Gee moved for a temporary restraining order and a preliminary injunction, a hearing was held on January 25, 1995. R.20. The Court below denied Gee's application for a temporary restraining order at that time, but scheduled a further hearing for January 27, 1995 on the motion for a preliminary injunction. Prior to that second hearing, defendants agreed to end Gee's suspension early and Gee agreed to withdraw the motion for a preliminary injunction. App. B3-B4 n.1.

The amended complaint alleged that defendants violated Gee's rights of free speech (Count I), equal protection (Count II), and due process (Count III). In February 1996, Gee moved for partial summary judgment against President Humphries, in his official capacity only, on the First Amendment claim. Thereafter, defendants made various motions for summary judgment, including one for summary judgment on all counts.

The District Court decided these motions in an opinion and order dated December 3, 1996. App. B. Applying the "public concern" test of *Connick v. Myers*, 461 U.S. 138 (1983), the District Court concluded that "it is plain that [Gee's comment] was a racially derogatory remark" (App. B6), and that it therefore could not have been on a matter of "public concern" as a matter of law and was not protected by the First Amendment.[2]

The District Court also rejected several other of

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[2] The District Court also sua sponte suggested that Gee had intentionally instigated the incident in order to challenge an adverse tenure decision that he knew was coming, but conceded that that was a "disputed" fact. App. B8 n.2. In fact, there was no competent evidence at all supporting that remarkable attribution of motive.

Gee's contentions on his First Amendment claims. First, the Court concluded that the fact that Gee's speech was made to his class in his role as a teacher actually *weighed against* any claim that his speech was on a matter of public concern. App. B7. Second, the District Court rejected Gee's claim that § 6C3-10.125, F.A.C., failed to give adequate notice that he would be punished for his speech because "it should have been obvious to Mr. Gee from . . . a reading of the rule" (App. B8) that his speech would be punished.

The District Court also rejected Gee's procedural due process claim because, under *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110 (1995), "a plaintiff cannot forego adequate state remedies for a federal procedural due process claim." App. B9. It also asserted that "Florida law provided Mr. Gee extensive procedural rights . . . including the right to eventual review in the Florida First District Court of Appeal," (*id.*), but cited no authority to support that proposition.

Finally, the District Court concluded that issues of fact remained with respect to Gee's Equal Protection claim. Because Gee wanted to immediately appeal the grant of summary judgment on his First Amendment and Due Process claims, he subsequently dismissed that claim in order to obtain a final judgment. Final judgment was entered on February 5, 1997. Gee timely appealed to the Eleventh Circuit, wherein he was supported by *amici* the American Association of University Professors and the American Civil Liberties Union Foundation of Florida.

The Eleventh Circuit affirmed the judgment of the District Court without opinion on April 3, 1998. App. A.

REASONS FOR GRANTING THE WRIT

This case presents two issues of importance over which the circuit courts have struggled mightily. The first is the protection under the First Amendment to be given expression by a university professor in the classroom, recognized by this Court as one of the hallmarks of academic freedom, *Edwards v. Aguillard*, 482 U.S. 578, 586 n.6 (1987), and how that freedom should be weighed against a university's interest in controlling speech that occurs in its classrooms. This case presents a particularly apt case for clarifying those issues because it also starkly illustrates the extent to which application of modern "harassment" principles can lead to restraints on free speech, a question which has created much debate in the courts.[3]

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[3] *E.g.*, *DeAngelis v. El Paso Municipal Police Officers Ass'n*, 51 F.3d 591, 596-97 (5th Cir.) ("It is no use to deny or minimize this problem because, when Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech"), *cert. denied*, 516 U.S. 974 (1995). The federal agency primarily responsible for enforcing the civil rights laws on college campuses has noted the serious First Amendment considerations that broadly applied "harassment" rules raise. *E.g.*, Department of Education Office of Civil Rights: Sexual Harassment Guidance, 62 Fed. Reg. 12032, 12045-46 (March 13, 1997) ("Title IX is intended to protect students from sex discrimination, not to regulate the content of speech").

Academics, too, have debated the line between free speech and harassment law. Eugene Volokh, *Freedom Of Speech And Workplace Harassment*, 39 UCLA L. Rev. 1791 (1992); Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment And The First Amendment. No Collision In Sight*, 47 Rutgers L. Rev. 461 (1995); Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 Rutgers L. Rev. 563 (1995); Kingsley R. Browne, *Workplace Censorship: A*

(continued...)

The second question revolves around when a state has deprived someone of liberty or property under *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986), and *Zinermon v. Burch*, 494 U.S. 113 (1990). The Eleventh Circuit has taken the broadest view of *Parratt*, far broader than any other circuit. Indeed, this case presents a striking example of how broad the interpretation is in the Eleventh Circuit. Gee followed every appeal available under Sec. 6C3-10.125, F.A.C. But because the courts below apparently discerned some additional (but unidentified) procedures, they concluded that the "state" had not yet deprived him of any property without due process.

A. This Court Should Grant The Petition To Resolve Important Questions Concerning First Amendment Protection For Professors At State Universities Over Which The Circuit Courts Have Split

In *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), this Court made clear that a professor's lecture in his classroom was speech protected by the First Amendment, holding that the state had the ability to inquire into its content only where the inquiries were sufficiently related to an important state interest. *Id.* at 243-44, 249-50, 251-52. Although the Court has repeatedly emphasized the important role that teachers and academic freedom play in our society, it has not returned to the question of how much protection from state retribution the First Amend-

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[3](...continued)
Response To Professor Sangree, 47 Rutgers L. Rev. 579 (1995); Suzanne Sangree, *A Reply To Professors Volokh And Browne*, 47 Rutgers L. Rev. 595 (1995).

ment affords in-class speech.

That question includes several subsidiary issues over which the lower courts are split. First, how does the "public concern" test of *Connick v. Myers*, 461 U.S. 138 (1982) apply to a teacher's in-class speech? Second, should teachers have some "fair notice" of what speech is prohibited? Third, how should the respective interests of professor and university be balanced?

1. "Public Concern". -- In *Connick*, this Court held that the First Amendment protects the speech of "public employees" primarily when it relates to matters of "public concern." When it comes to pedagogic speech, though, this Court has never applied that requirement. In *Sweezy*, decided many years before *Connick*, the Court never identified the content of the professor's lecture. In *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995), decided years after, the Court considered the First Amendment rights of *all government employees* speaking on a wide array of topics, including dance performances and other matters that would hardly be considered of "public concern" if the importance of the subject matter were the only criteria. *See also Nat'l Treasury Employees Union v. United States*, 990 F.2d 1271, 1273 (D.C. Cir. 1993) ("Viewing the idea of 'public concern' in the abstract, one might suppose it excluded some of the topics on which plaintiffs have spoken or written -- such as the technology of Civil War ironclads"), *aff'd in part, rev'd in part*, 513 U.S. 454 (1995).

The lower courts have been split on the application of the "public concern" test to pedagogic speech. The First Circuit applies a two-part test, neither leg of which is related to public concern. *Ward v. Hickey*, 996 F.2d 448,

452-53 (1st Cir. 1993) (state "may regulate a teacher's classroom speech if: (1) the regulation is reasonably related to a legitimate pedagogical concern . . . ; and (2) the school provided the teacher notice of what conduct was prohibited"); *Silva v. University of New Hampshire*, 888 F. Supp. 293, 315 n.16 (D.N.H. 1994) (First Circuit does not apply "public concern" test).

Other circuits, while not explicitly eschewing the "public concern" test, have analyzed classroom or pedagogic speech without reference to it. *Miles v. Denver Public Schools*, 944 F.2d 773 (10th Cir. 1991) (applying a balancing test to ninth grade teacher's comments about two students having had sexual intercourse on the school's tennis court; no discussion of "public concern"); *Parate v. Isibor*, 868 F.2d 821, 827 (6th Cir. 1989) (teacher's assignment of a grade to a student was a symbolic communication intended to send a specific message and was thus protected by the First Amendment; no discussion of "public concern"); *Stachura v. Truszkowski*, 763 F.2d 211, 215 (6th Cir. 1985) (suspension of teacher for having used particular "life sciences" text violated that teacher's First Amendment rights; no discussion of "public concern"), *rev'd on other grounds*, *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986).

On the other hand, the Second and Fifth Circuits have applied the "public concern" test to classroom speech. *Blum v. Schlegel*, 18 F.3d 1005, 1012 (2d Cir. 1994); *Martin v. Parrish*, 805 F.2d 583, 584 (5th Cir. 1986). And, of course, the courts below in this case applied the Eleventh Circuit's standard four-part test for public employee speech, the first part of which asks whether the speech meets the "public concern" test.

The usual "public concern" inquiry is problematic when dealing with pedagogic or classroom speech. Most importantly, this Court in *Connick* contrasted "public concern" with speech made "as an employee upon matters only of personal interest." *Connick*, 461 U.S. at 147. The lower courts have interpreted this holding as definitional, *i.e.*, as excluding from the "public concern" rubric only such "personal interest" speech. *See, e.g.*, *Burnham v. Ianni*, 119 F.3d 668, 679 (8th Cir. 1997) (en banc) ("public concern" speech "includes many types of speech, excluding mainly speech relating merely to internal office grievances"; teachers' communication of their interests in history met test); *Dishnow v. School Dist. of Rib Lake*, 77 F.3d 194, 197 (7th Cir. 1996) (public concern is not limited to "matters of transcendent importance, such as the origins of the universe or the merits of constitutional monarchy; [it] mean[s] matters on which the public might be interested, as distinct from wholly personal grievances"; article discussing "sharing of household tasks by a working couple" is of public concern); *Nat'l Treasury Employees Union v. United States*, 990 F.2d 1271, 1273 (D.C. Cir. 1993) ("we read the 'public concern' criterion as referring not to the number of interested listeners or readers but to whether the expression relates to some issue of interest beyond the employee's bureaucratic niche"), *aff'd in part, rev'd in part*, 513 U.S. 454 (1995); *Berger v. Battaglia*, 779 F.2d 992, 998 (4th Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986) (blackface singing performance protected because "public concern" speech includes all speech "except that which, realistically viewed, is of purely 'personal concern' to the employee -- most typically, a private personnel grievance").

Pedagogic speech -- speech designed to communicate a message from professor to student -- transcends the

teacher's personal concern almost by definition. While it is part of professors' job responsibilities to so communicate, the communications are not *about* their jobs and are not matters of only *personal* concern. This case presents an opportunity for the Court to define the "public concern" test with greater clarity for the lower courts in an important context.

The Courts below found that Gee's speech was not a matter of public concern because it was "plain" that it was a "racially derogatory remark directed at students" in his class. Such analysis cannot withstand scrutiny, particularly on a motion for summary judgment, and ignores this Court's injunction that a determination of whether speech is of "public concern" requires consideration of the "content, form and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 148. The only thing "plain" about Gee's speech is that he tried to make an important point about individual initiative to his students. *See* Brief of Board Defendants to Eleventh Circuit Court of Appeals, p. 20 (Gee wanted to convey "the idea that some members of the community perceive African-Americans as lacking the motivation to seek out or create employment opportunities").[4]

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[4] The District Court cited two cases, *Martin v. Parrish*, 805 F.2d 583 (5th Cir. 1986) and *Dambrot v. Central Michigan Univ.*, 55 F.3d 1177 (6th Cir. 1995), for the proposition that there was no genuine issue of fact that Gee's speech was not on a matter of public concern. Each case, though, involved the use of profanity without any message at all. Martin conceded that his use of profanity was nothing more than an "expression of frustration with [his students'] progress" (*Martin*, 805 F.2d at 585). Coach Dambrot was urging his basketball players to play harder on the court. Both courts emphasized that individual context was decisive. *Id.* at 586 ("surroundings and context are essen-

(continued...)

2. Fair Notice. -- The lower courts rejected Gee's claim that FAMU had not given him fair notice that his speech could be considered racially harassing, concluding that a reading of the rule or common sense should have given Gee notice. This puts the Eleventh Circuit in conflict with other circuits, particularly the Ninth, which have held that racial or sexual "harassment" rules do not give "notice" that controversial classroom speech can be the subject of teacher discipline.

Of course, the notion that Gee's speech could be considered a form of "racial harassment" is absurd if those words are given the meaning that they are generally understood to encompass -- implicating objectively "severe" and "pervasive" conduct. *E.g.*, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (hostile environment requires "severe and pervasive" conduct, going beyond that which is merely "offensive," and must create a hostile environment both subjectively and objectively; "'mere utterance of an . . . epithet that engenders offensive feelings'" does not violate the law); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) ("'mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee' would not . . . violate Title VII" quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)). The question, then, is to what extent academic freedom requires universities to give

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[4](...continued)
tial, case-by-case determinants of the constitutional protection accorded to indecent language"); *Dambrot v. Central Michigan University*, 839 F. Supp. 477, 489 (E.D. Mich. 1993) ("had [basketball coach] been doing *almost anything* with more intellectual content than encouraging basketball players with [use of the term "nigger"], he could persuasively argue that the matter [was of public concern]" (emphasis added)), *aff'd*, 55 F.3d 1177 (6th Cir. 1995).

reasonable notice that particular speech is prohibited.

This Court applied such a requirement more than thirty years ago in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). There, this Court examined a regulatory scheme imposed by New York statutes and rules designed to preclude the appointment or retention of "subversive" persons in state employment. It held that the ill-defined contours of that term rendered the regulatory scheme violative of the First Amendment. "When one must guess what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone . . .'" *Id.* at 604.

In considering questions of discipline for in-class speech, the lower courts generally have applied this standard. *Cohen v. San Bernardino Valley College*, 92 F.3d 968, 970, 972 (9th Cir. 1996) (university violated First Amendment by punishing teacher for sexual harassment for his classroom speech, holding that "the [sexual harassment] Policy is simply too vague as applied to [professor] in this case"), *cert. denied*, 117 S. Ct. 1290 (1997); *Ward v. Hickey*, 996 F.2d 448, 452-53 (1st Cir. 1993) (punishment permissible for in-class speech only if "the school provided the teacher with notice of what conduct was prohibited"; a school "is not entitled to retaliate against speech that it never prohibited"). *Cf. Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1177, 1179 (3d Cir. 1990) (teacher adequately asserted due process claim where she alleged that ban on certain teaching technique failed to give her adequate notice of what was prohibited).

Although the District Court here purported to apply a "fair notice" requirement, its analysis, as affirmed by the Eleventh Circuit, creates a plain circuit split with the

Ninth Circuit's decision in *Cohen*. In *Cohen*, the Court considered a professor's *repeated* focus on topics of a sexual nature, and his use of profanities, vulgarities, pornography, and letters to *Hustler* magazine -- speech far more "severe" and "pervasive," and far more likely to be characterized as "harassing" under normal standards, than Gee's isolated, contextual expression of his views using one racially-tinged word. *See also, e.g.*, *Hosford v. School Committee of Sandwich*, 421 Mass. 708, 716, 659 N.E.2d 1178, 1182 (1996) (rule against the use of "profane or abusive language" did not give fair notice that teacher could be punished for leading discussion on use of certain words like "bitch" and "prick"); *Silva v. University of New Hampshire*, 888 F. Supp. 293, 312-13 (D.N.H. 1994) (punishment of teacher for having made sexual analogies and references in his English class violated First Amendment; "sexual harassment" policy, which precluded creating a "hostile environment," did not give adequate notice that such statements could be punished).

Given the prevalence of campus codes precluding the use of "harassing" speech, this Court should grant this petition to resolve the degree and extent to which those codes can be used to regulate "speech that d[oes] not fall within the core region of . . . harassment defined by [those codes]." *Cohen*, 92 F.3d at 972.

3. Balancing. -- The circuit courts in general have been split as to how to weigh the competing interests when in-class speech is involved. Several courts, rather than following the traditional balancing test for public employee speech under *Pickering v. Bd. of Ed.*, 391 U.S. 563 (1968), have relied upon the balancing test supplied by *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). *See Ward v. Hickey*, 996 F.2d 448, 452-53 (1st

Cir. 1993) (applying *Kuhlmeier*); *Miles v. Denver Public Schools*, 944 F.2d 772, 777 (10th Cir. 1991) (rejecting *Pickering* test in favor of *Kuhlmeier*). The Courts below, of course, would have applied a four-part test which derives from the *Connick-Pickering* line of cases. *See also Blum v. Schlegel*, 18 F.3d 1005, 1011-12 (2d Cir. 1994) (applying *Pickering* test).

Moreover, regardless of the appropriate test, further guidance on balancing the competing interests of the university and the professor is needed. Unlike other workplaces, universities thrive on intellectual ferment and disagreement. *See Blum*, 18 F.3d at 1012 ("efficient provision of services by a State university's law school actually depends, to a degree, on the dissemination in public fora of controversial speech implicating matters of public concern"). If students, or other faculty members, have a "heckler's veto" over faculty speech, academic freedom will be greatly curtailed. Richard A. Hiers, *Academic Freedom In Public Colleges And Universities: O Say Does That Star-Spangled First Amendment Banner Yet Wave?*, 40 Wayne L. Rev. 1, 40 (1993) ("Persons with careers in academe know how little it takes to upset the delicate balance of competing egos and ideologies in academic departments"). Free speech will be shackled in the very place it should be most free.

B. This Court Should Grant The Petition To Resolve The Split Between The Circuit Courts Over Whether A Plaintiff Must Exhaust All State Judicial Remedies Before Bringing A Procedural Due Process Claim Under The Fourteenth Amendment

Relying on the Eleventh Circuit decision in

McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) (en banc), *cert. denied*, 513 U.S. 1110 (1995), the lower courts in this case concluded that Gee had not exhausted all of his state remedies, and thus could not bring a claim for a violation of procedural due process under the Fourteenth Amendment. The holding in *McKinney v Pate* is at odds with most other circuits and established Supreme Court doctrine. This Court should grant the petition to resolve this conflict among the circuits.[5]

In *McKinney*, a public employee complained that the body that held a hearing before his termination was biased. The Eleventh Circuit held that even where a public employee is deprived of his property interest in continued employment without due process, the employee has no claim under the Constitution for a denial of procedural due process if there are additional state procedures, administrative or judicial, that can remedy the deprivation. *McKinney*, 20 F.3d at 1564 ("The Florida courts possess the power to remedy McKinney's loss both in terms of damages and equitable relief; as such, the Florida procedures satisfy procedural due process and alleviate any deprivation McKinney may have suffered at the hands of the Board"). In support of this conclusion, *McKinney* relied upon this Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981), which held that where a state employee

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[5] The District Court did not dispute that the procedures used by FAMU were inconsistent with due process. In the Eleventh Circuit, due process requirements include both fair procedures and a result which is supported by substantial evidence. *McKinney v. Pate*, 20 F.3d 1550, 1558 n.13 (11th Cir. 1994) (en banc). In cases involving the punishment of teachers at public schools or colleges, the minimum procedural steps include notice of the names of adverse witnesses and the nature of their testimony. *Martin v. Guillot*, 875 F.2d 839, 844 (11th Cir. 1989).

engages in a "random and unauthorized act" that deprives the plaintiff of his property in an unforeseeable way -- in that case the misplacement of a prisoner's hobby items by a prison guard -- it is impractical to require the state to provide predeprivation process, and the state therefore may satisfy its obligation to provide due process by merely providing a post-deprivation tort remedy. *Parratt*, 451 U.S. at 541.

Although *McKinney* itself involved only a claim that a hearing board was biased, the Eleventh Circuit has made plain in subsequent cases (including this one) that post-deprivation procedures must be used (1) regardless of why the initial procedures (or lack thereof) were inadequate and (2) regardless of whether the state actors were acting pursuant to an established state procedure, by authority granted to them, or otherwise. *Harris v. Bd. Of Ed. Of The City of Atlanta*, 105 F.3d 591, 596 (11th Cir. 1997) (superintendent's procedural due process claim against board of education, which relieved superintendent of duties without any hearing at all, would require consideration of whether Georgia provided adequate post-termination remedies; "district court must eventually address this question"); *Bell v. City of Demopolis*, 86 F.3d 191, 192 (11th Cir. 1996) (no procedural due process claim by police officer whose termination was reviewed by a special "police committee" and city council; inadequacy of either pre-termination or post-termination process could have been remedied by state judicial review); *Tinney v. Shores*, 77 F.3d 378, 382 (11th Cir. 1996) (no procedural due process claim against Sheriff and Deputy Sheriff who sold house-trailer pursuant to landlord's lien because plaintiffs did not plead inadequacy of post-sale procedures).

The Eleventh Circuit's interpretation of *Parratt*

conflicts with virtually every other circuit, most of which have held that *Parratt* is limited to cases where the conduct in question is truly "random" or "unauthorized." Indeed, a number of circuits have so held in contexts identical to the situation here. *E.g.*, *Moore v. Board of Education of Johnson City*, 134 F.3d 781, 785 (6th Cir. 1998) (rejecting district court's *Parratt*-based dismissal of due process claim, by teacher terminated after initial hearing, because teacher did not appeal case to state court; teacher "was required neither to plead nor prove the inadequacy of post-termination state law remedies in order to prevail"); *Loudermill v. Cleveland Bd. of Education*, 721 F.2d 550, 555 (6th Cir. 1983), *aff'd*, 470 U.S. 532 (1985); *Cotnoir v. University of Maine System*, 35 F.3d 6, 9, 12 (1st Cir. 1994) (professor's claim for procedural due process sustained even though he "waived his right to appeal to the Board of Trustees"; existence of additional state remedies was irrelevant because "the availability of post-termination grievance procedures will not ordinarily cure the violation"); *Kercado-Melendez v. Aponte-Roque*, 829 F.2d 255, 263 (1st Cir. 1987), *cert. denied*, 486 U.S. 1044 (1988); *Charchenko v. City of Stillwater*, 47 F.3d 981, 984 (8th Cir. 1995) (terminated police officer who "did not pursue any administrative remedies in state court" could nonetheless assert due process claim in federal court); *Dwyer v. Regan*, 777 F.2d 825, 832 (2nd Cir. 1985) (civil service employee who could have, but did not, challenge termination pursuant to N.Y.C.P.L.R. Art. 78, could bring due process claim against New York State Comptroller who fired him; "where the depriving actions were taken by a high-ranking official having final authority over the decision-making process, . . . they were not random or unauthorized within the meaning of *Parratt*"); *Stana v. School Dist. of City of Pittsburgh*, 775 F.2d 122,

129 (3d Cir. 1985).[6]

Outside of the Eleventh, the Seventh Circuit has given the broadest definition to the "random and unauthorized" concept in *Parratt*. *Easter House v. Felder*, 910 F.2d 1387, 1400-05 (7th Cir. 1990) (en banc) (conspiracy among state agents to deprive private adoption agency of operating license "random" and "unauthorized" because in violation of state law), *cert. denied*, 498 U.S. 1067 (1991). (In so doing, one judge complained that the holdings of this Court were impossible to reconcile. *Id.* at 1408 (Easterbrook, J. concurring)). *See Tri County Industries, Inc. v. District of Columbia*, 104 F.3d 455, 460 (D.C. Cir. 1997) ("there is a circuit split on this issue" citing *Easter House*). Of course, even the Seventh Circuit

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[6] *See also, e.g.*, *Brooks v. George County*, 84 F.3d 157, 164 & n.6, 165 (5th Cir. 1996) (*Parratt* inapplicable to sheriffs' failure to pay pretrial detainee for work done on public property even though sheriff violated state law and plaintiff had the right to (but did not) seek payment before the county board of supervisors or in state court; "where employees are acting in accord with customary procedures, the 'random and unauthorized' element required for the application of [*Parratt*] is simply not met"), *cert. denied*, 117 S. Ct. 359 (1996); *Plumer v. Maryland*, 915 F.2d 927, 928-29 (4th Cir. 1991) (plaintiff could assert due process challenge to the revocation of her driver's license even though revocation allegedly violated state law and she could have "appeal[ed] the MVA's decision to the Circuit Court for Calvert County"); *Winters v. Board of County Commissioners*, 4 F.3d 848, 857 & n.12 (10th Cir. 1993) (pawn shop could assert due process challenge to sale of confiscated property even though Sheriff's Department violated state law and procedure was available for pawn shop to assert ownership rights under state law; "Available postdeprivation procedures are insufficient to neutralize a due process violation when the action is planned and authorized"), *cert. denied*, 511 U.S. 1031 (1994); *Haygood v. Younger*, 769 F.2d 1350, 1357 (9th Cir. 1985) (en banc) (*Parratt* applies in a "narrowly limited class of cases"), *cert. denied*, 478 U.S. 1020 (1986).

(unlike the Eleventh) recognizes that *Parratt* is inapplicable when actions are taken under an established state procedure. *Cushing v. City of Chicago*, 3 F.3d 1156, 1165 (7th Cir. 1993).

The other circuits all have relied upon this Court's decisions limiting *Parratt*. In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435 (1982), for example, this Court found *Parratt* inapplicable where Illinois deprived plaintiff of a hearing on his employment discrimination claim after a commission for that purpose negligently failed to provide one within the 120 days required by the law. Although Illinois law provided a remedy for negligence by state actors, this Court held that *Parratt* did not require resort to that remedy because "it is the state system itself that destroys a complainant's property interest." *Zimmerman Brush*, 455 U.S. at 436.

Zinermon v. Burch, 494 U.S. 113 (1990) limited *Parratt* even further, by holding that a man who voluntarily admitted himself into a mental hospital could bring a procedural due process claim against mental hospital staff who admitted him without an adequate precommitment process -- even though the plaintiff also alleged that the confinement violated state law for such commitments (*Zinermon*, 494 U.S. at 123-24), and even though state law provided him with other remedies (*id.* at 130 n.15).

The *Zinermon* Court found *Parratt* distinguishable because plaintiff's confinement in the mental hospital was not a "random and unauthorized" act for which a pre-deprivation hearing was impractical, but rather was pursuant to an "established state procedure"; that is, "[t]he State ha[d] delegated to [the defendants] the power and authority to effect the very deprivation complained of." *Id.* at 138.

Zinermon held that the *Parratt* was a "special case" in due process analysis where "postdeprivation tort remedies are all that is due, simply because they are the only remedies the State could be expected to provide." *Zinermon*, 494 U.S. at 128.[7]

The Eleventh Circuit's broad interpretation of *Parratt* is at odds with these precedents. Here, Gee was not suspended pursuant to any "random or unauthorized" acts. Rather, defendants acted pursuant to Section 6C3-10.125, F.A.C., and by the authority invested in them as administrators of FAMU.[8] Defendants are perfectly analogous to the hospital workers in *Zinermon*, in whom au-

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[7] Although not directly addressing *Parratt*, this Court's decision in *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985) also strongly militates against the Eleventh Circuit's rule. *Loudermill* involved the claim of a state employee, terminated based upon an accusation of lying on his employment application, who claimed that his pretermination hearing failed to meet minimum requirements. This Court upheld that claim, even though the employment decision was "subject to judicial review in the state courts" and the employee failed to seek such review. This Court also rejected the employee's claim that the posttermination administrative proceedings violated due process (*Loudermill*, 470 U.S. at 547); this, however, did not affect the viability of the claim that the initial hearing violated due process because they were "separate claim[s] altogether." Id. at 547 n.12. This holding cannot be reconciled with the Eleventh Circuit's view that a violation of procedural due process is not "complete" until a plaintiff has availed himself of all the remedies provided by the state. *E.g.*, *Stana v. School Dist. of City of Pittsburgh*, 775 F.2d 122, 129 (3d Cir. 1985) (so interpreting *Loudermill*).

[8] The procedures in Section 6C3-10.125, for example, were deficient in that they provide for notice of allegations, and the reasons for punishment, but no notice of the evidence that was relied upon by FAMU. *See* § 6C3-10.125(5)(d), (e), F.A.C. (App. D11-D12).

thority, however exercised, was invested by the state.[9]

Of course, states have constitutions and most of them have provisions similar to the Fourteenth Amendment's due process clause (*e.g.*, Fla. Const. art. I, § 9). If taken to its logical conclusion, the Eleventh Circuit's application of *Parratt* would mean that all deprivations of property or liberty without due process would *have* to be brought in state court, under a state constitutional provision. So, too, because of principles of *res judicata* (*viz.*, merger and bar), any claim arising out of the same facts (like Gee's First Amendment claim) would have to be brought in state court. *Loudermill v. Cleveland Bd. of Education*, 721 F.2d 550, 555 (6th Cir. 1983) ("if there were . . . a requirement [of exhaustion], then principles of

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[9] The application of the Eleventh Circuit's expansive reading of *Parratt* is particularly harsh here. Gee took each appeal of which FAMU advised him and that are set forth in Sec. 6C3-10.125. Although the District Court referred to other state remedies, it never truly identified them. At the outset of its due process discussion, the District Court noted that Gee had "initially appeal[ed] his suspension [sic] to the Board of Regents," but did not do so when FAMU reimposed the suspension. App. B8. Actually, Gee filed a grievance under his collective bargaining agreement when President Humphries decided not to renew his contract in November 1993, and that grievance eventually reached a designee of the Board. That option was unavailable after the matter was remanded to Ms. Gavin for an investigation and recommendation. R.169-Att., Ex. T, CBA ¶ 20.2 ("the President's response to a recommendation of a hearing officer or other individual or group having appropriate jurisdiction in any other procedure shall not be an act or omission giving rise to a grievance" (emphasis added). So, too, despite the Court's reference to "eventual review in the Florida District Court of Appeal" App. B9, neither the Courts below nor defendants ever cited one instance of a decision under Sec. 6C3-10.125 ever being reviewed in a Florida court. *See also* Sec. 6C3-10.125(8)(b) (App. D15) (if administrative appeal is taken, "doctrine of election of remedies" applies).

res judicata and collateral estoppel would bar almost all access to federal courts in Sec. 1983 actions, a result plainly at odds with congressional intent"), *aff'd*, 470 U.S. 532 (1987). Perhaps that is what this Court intended in *Parratt*; if so, though, a more explicit statement would better guide the lower courts.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

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APPENDICES

A Opinion Of The United States Court Of Appeals For The Eleventh Circuit Affirming The Judgment Of The District Court (April 3, 1998) A1

B Order And Opinion Of The United States District Court For The Northern District Of Florida (December 3, 1996) B1

C Final Judgment Of The United States District Court For The Northern District Of Florida Dismissing The Plaintiff's Action (February 5, 1997) C1

D Text Of Constitutional And Statutory Provisions Involved: D1

1 U.S. Constitution, Amend. I D1

2 U.S. Constitution, Amend. XIV, Sec. 1 . . . . D1

3 42 U.S.C. § 1983 . . . . . D2

4 Florida Administrative Code, Sec. 6C3-10.125 . . . . . D3

E Charges Of Discrimination/Harassment E1

F Letter From Gavin To Gee Dated August 23, 1994 . . . . . F1

G Letter From Gee To Gavin Dated August 31, 1994 . . . . . G1

H Letter From Gavin To Gee Dated August 31, 1994 . . . . . H1

I Gee's Response To Charges I1

J Investigative Report J1

K Letter From Humphries To Gee Dated October 24, 1994 (Suspension Notice) K1

L Letter From Gee To Humphries Dated November 9, 1994 (First Appeal) L1

M Letter From Humphries To Gee Dated December 2, 1994 (Denial Of First Appeal) M1

N Letter From Gee To Humphries Dated January 9, 1995 (Second Appeal) N1

O Letter From Humphries To Gee Dated January 11, 1995 (Denial Of Second Appeal) O1

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-2265

D.C. Docket No. 95-40031-RH

GERALD GEE,

Plaintiff-Appellant,

versus

FREDERICK HUMPHRIES; BISHOP HOLIFIELD; et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida

(Filed Apr. 3, 1998)

Before COX and HULL, Circuit Judges, and FAY, Senior Circuit Judges.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.

"Costs taxed against plaintiff-appellant."

Entered: April 3, 1998
For the Court: Thomas K. Kahn, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: MAY 13 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

GERALD GEE,

Plaintiff,

v. CASE NO. 95-40031-RH

FREDERICK HUMPHRIES, et al.,

Defendants.

_____/

ORDER ON SUMMARY JUDGMENT

(Filed Dec. 3, 1996)

In this action plaintiff Gerald Gee, formerly an assistant professor at Florida A&M University ("FAMU"), seeks damages and injunctive relief as remedies for a two-week suspension without pay, FAMU's refusal to grant him tenure, and FAMU's refusal to renew his contract. By this order I enter partial summary judgment for the defendants.

Facts

In 1977 Mr. Gee became an assistant professor of journalism at FAMU, one of the ten universities that comprise the state university system of Florida. In 1982 Mr. Gee's department chairman advised him that his "declining evaluations" and failure to obtain a doctoral degree would raise questions at the time of his expected application for tenure in 1983. Rather than undergo an evaluation for tenure, Mr. Gee accepted a demotion to

instructor, thus departing from the tenure track. As Mr. Gee has put it, FAMU then-president Walter Smith "wasn't inclined to approve my tenure application."

Mr. Gee returned to the tenure track in 1989 and, in accordance with the usual schedule for tenure-track faculty members, was expected to apply for tenure in 1994. On August 23, 1993, the dean of his school and director of his division within the school wrote a letter to Mr. Gee stating:

> [Y]ou come up for tenure this year. Unless there have been some productive activities on your part which we do not know about, we are seriously concerned about your ability to receive tenure. You should recall that Dean Ruggles has expressed concern about that in your administrative evaluations at least the last two years. We invite your attention, yet again, to the School's tenure and promotion policy statements.

(Document 169, Exhibit A, Exhibit 22).

Mr. Gee responded by letter dated September 10, 1993. He seemingly acknowledged his "woeful lack of research productivity" but argued this was more than offset by his "record in the areas of teaching and service," a record he said was "substantially better than most on our faculty."

On September 20, 1993, Mr. Gee entered the classroom shortly before the start of his Public Relations Case Studies ("PUR 4001") course. A discussion was in progress among some or all of the 14 students in the class – all of whom were black – regarding whether FAMU provided sufficient opportunities for public relations majors

to acquire practical experience. By his own account, Mr. Gee, who is white, said:

> Now I'm going to say something which may upset some of you, because I'm going to use a term that I, myself, consider offensive. What I'm about to say is *not* directed at any of you, or all of you as a class; it's just something I want you to think about . . .
>
> What I want you to be aware of is that in this day and age, a person can't sit around waiting for someone to give them something. Anyone who doesn't take advantage of the opportunities that are there, or who doesn't make opportunities for themselves may be guilty of having what some would call a "nigger mentality" – the sort of thinking that can keep us all on the back of the bus forever.

(Amended and Supplemental Complaint, document 83, at ¶ 17, ellipses in original). Not surprisingly, the remark caused at least some disruption, both immediately (two students left the class) and for some period thereafter. A number of students complained about Mr. Gee's remarks.

Following an extended investigation of the students' complaints and an opportunity for Mr. Gee to respond, on October 24, 1994, FAMU president Frederick Humphries advised Mr. Gee he would be suspended for two weeks without pay. Mr. Gee initially challenged the suspension through an administrative appeal but eventually chose to proceed in this court instead.[1]

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[1] The appeal substantially delayed service of the suspension. When the suspension actually began, Mr. Gee filed

On November 23, 1994, Mr. Gee submitted an application for tenure. Mr. Gee's dean and division head and the tenure committee of the School of Journalism all recommended denial. The university-wide tenure committee chose to make no recommendation for or against tenure. The provost recommended denial. FAMU president Frederick Humphries reviewed these recommendations and determined to recommend to the Board of Regents that it deny tenure. The Board of Regents accepted that recommendation. By letter dated April 18, 1995, Dr. Humphries advised Mr. Gee that his contract would not be renewed at the end of the spring semester of 1996. Mr. Gee's employment at FAMU ended at that time.

The Claims and Pending Motions

In this lawsuit Mr. Gee contends that his suspension, the denial of tenure and the non-renewal of his contract violated his rights to free speech under the First Amendment, as made applicable to the states by the Fourteenth, because those actions were based in whole or in part on his remarks to students in his PUR4001 class as quoted above. Mr. Gee also contends FAMU denied his rights to procedural due process under the Fourteenth Amendment. Finally, Mr. Gee contends that he was the victim of racial discrimination in violation of the Fourteenth Amendment because, had he been black, he would not have been suspended and would have received tenure.

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this lawsuit. Apparently in order to moot Mr. Gee's request for a preliminary injunction, FAMU reinstated him prior to service of the entire two week suspension.

Mr. Gee has named as defendants Dr. Humphries and other FAMU officials (in their individual and official capacities) and all members of the Board of Regents (in their official capacities).

Pending are cross-motions for summary judgment. I hold that FAMU was entitled to take disciplinary action against Mr. Gee based on the racially derogatory remarks he made to his students and that summary judgment therefore should be entered for the defendants on Mr. Gee's First Amendment claim. I hold further that the State of Florida and FAMU afforded Mr. Gee constitutionally adequate procedures in connection with his suspension and that summary judgment therefore should be entered for the defendants on Mr. Gee's procedural due process claim. Finally, I hold that whether Mr. Gee was the subject of racial discrimination is a disputed issue of fact precluding summary judgment on that issue.

First Amendment

Mr. Gee is not, of course, the first public employee to assert he suffered adverse employment action as a result of exercising his First Amendment rights. The well settled law in this circuit subjects such claims to a four-prong test. *See, e.g., Morgan v. Ford*, 6 F.3d 750, 753-54 (11th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 2708, 129 L.Ed.2d 836 (1994); *Belyeu v. Coosa County Bd. of Educ.*, 998 F.2d 925, 928 (11th Cir. 1993); *Bryson v. City of Waycross*, 888 F.2d 1562, 1565 (11th Cir. 1989). The first prong is fatal to Mr. Gee's First Amendment claim here.

Under this prong, a public employee can prevail on a First Amendment claim alleging adverse employment

action only if the speech at issue addresses "a matter of public concern." *Morgan*, 6F.3d at 754. *This is a question of law for the court. Connick v. Myers*, 461 U.S. 138, 148 n.7, 103 S.Ct. 1684, 1690 n.7, 75 L.Ed.2d 708 (1983). Whether speech is on a matter of public concern is to be determined based on the "content, form and context" of the speech at issue. *Connick*, 461 U.S. at 147-48, 103 S.Ct. at 1690.

At a superficial level, Mr. Gee's remark could be characterized as addressing a matter of public concern because it deals with opportunities being provided to students at a public university. But the cases applying this standard make clear that a more comprehensive evaluation is appropriate. From the "content, form and context" of Mr. Gee's comment, it is plain that this was a racially derogatory remark directed at students in Mr. Gee's class. The university constitutionally could, and any university appropriately would, take corrective or disciplinary action against a professor making such a remark. Nothing in the First Amendment precludes a public employer from disciplining employees who, during the course of their public employment, issue this kind of racial invective to those in their charge. *See, e.g., Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (holding that a coach's use of the term "nigger" to "motivate" his players was not speech on a matter of public concern); *Martin v. Parrish*, 805 F.2d 583, 585 (5th Cir. 1986) (holding that professor's use of profanity in order to "motivate" his students was not speech on a matter of public concern).

It is precisely to weed out claims such as Mr. Gee's that public employees must show speech on a matter of

public concern as a prerequisite to challenging adverse employment action under the First Amendment. There must be some measure of common sense in the rules that govern public employment. As a matter of plain common sense, no employer, public or private, would tolerate this kind of remark. Indeed, tolerating this kind of remark might well subject an employer to civil rights litigation or, at the least, well founded criticism for racial intolerance. The requirement that speech be on a matter of public concern insulates a public employer from liability for enforcing the basic and reasonable standards of conduct that, as a matter of common sense, any employee reasonably can and should be expected to follow.

Mr. Gee suggests, however, that the requirement that speech be on a matter of public concern always is met by speech in a "pedagogic context." I disagree. Moreover, any special treatment afforded the "pedagogic context" would, on balance, cut against Mr. Gee. The university president (and others with authority over the operation of the university) have interests in "academic freedom" just as surely as does an individual professor. Nothing in the First Amendment precludes a university president from determining that, at his or her university, professors will not direct racially derogatory remarks at students. Whatever the contours of "academic freedom," that concept does not immunize professors from review by a university president of remarks such as those at issue here.

Mr. Gee also asserts that FAMU's rule against discrimination and harassment, which FAMU cited as grounds for his suspension, is vague. But a university,

like any other public employer, need not have a comprehensive code of conduct to govern its employees; public employees may be disciplined for good cause even without a specific written rule prohibiting the conduct at issue. It should have been obvious to Mr. Gee, from either a reading of the rule at issue or just as a matter of plain common sense unrelated to any written rule, that this kind of racially derogatory remark could and reasonably would result in corrective or disciplinary action. Mr. Gee could not possibly have thought he was free to direct this kind of remark at his students with impunity.[2]

In sum, defendants are entitled to summary judgment on Mr. Gee's First Amendment claim.

Procedural Due Process

Florida law provided Mr. Gee constitutionally adequate procedures for challenging his two-week suspension. Mr. Gee invoked those procedures initially, appealing his suspension to the Board of Regents. The Board reversed the suspension based on failure to comply with the proper procedures and remanded for further consideration at the university level. When the university again imposed the suspension on remand, Mr. Gee chose to abandon the state procedures in favor of this lawsuit.

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[2] The likelihood of discipline was so clear that, indeed, one could reasonably posit that Mr. Gee calculatedly made the remark as a basis for this lawsuit challenging the adverse tenure decision that he knew was probably coming anyway. Whether this is so, however, is a disputed issue of fact, and I give no weight to this possibility in resolving the pending summary judgment motions.

Under *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994) (en banc), *cert. denied*, ___ U.S. ___, 115 S.Ct. 898, 130 L.Ed.2d 783 (1995), a plaintiff cannot forego adequate state remedies for a federal procedural due process claim. Florida law provided Mr. Gee extensive procedural rights, far exceeding the requirements of due process, as well as adequate remedies for any departure from the required procedures, including the right to eventual review in the Florida First District Court of Appeal and possibly the Florida Supreme Court. Accordingly, under *McKinney*, Mr. Gee's procedural due process claims are clearly unfounded.

Mr. Gee tries to avoid *McKinney* on the grounds that FAMU allegedly failed to follow the applicable rules or somehow kept him from invoking Florida's undeniably adequate set of administrative remedies. But even if true, this would mean only that Mr. Gee would have had to invoke the procedures available under Florida law to correct such errors. Under *McKinney*, a litigant to whom such procedures are available – that is, to whom the state affords a right to due process – simply has no claim for denial of due process.

Equal Protection

Mr. Gee asserts the defendant FAMU officials recommended the denial of tenure because Mr. Gee is white. Mr. Gee claims the FAMU officials repeatedly changed the tenure requirements, in effect raising the bar each time he appeared ready to clear it. Mr. Gee cites Dr. Humphries' letter to Mr. Gee referring to him as a "white professor" and a Wall Street Journal articie quoting Dr.

Humphries as saying Mr. Gee would have been treated differently had he been black.[3]

Defendants assert that Dr. Humphries referred to Mr. Gee as a "white professor" only in discussing Mr. Gee's racial invective to his black students. They correctly note that, in the context of a racial vulgarity, the race of the speaker may affect the meaning and import of the remark. But whether this fully explains Dr. Humphries' remark probably is a question for a jury, and in any event Mr. Gee also points to evidence that FAMU provided different explanations of what he needed to do to obtain tenure or why his efforts in that regard fell short of the mark.

In short, while Mr. Gee's evidence on this claim is thin, it is sufficient to withstand defendants' motion for summary judgment.

Proper Defendants

Mr. Gee has sued various FAMU officials in their individual and official capacities and the members of Florida's Board of Regents in their official capacities. Mr.

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[3] Mr. Gee has provided no sworn support for his assertion that Dr. Humphries made such a remark. Mr. Gee asserts, however, that the reason he has not done so is that, under Eleventh Circuit precedent, he supposedly can rely on the newspaper story. I need not resolve this issue because there is a disputed issue of fact on the Equal Protection claim with or without the newspaper story. I note, however, that the law on this is not nearly so clear as Mr. Gee claims. *See, e.g., McMillian v. Johnson*, 88 F.3d 1573, 1583-85 (11th Cir. 1996).

Gee seeks, among other things, damages and injunctive relief.

It is impossible to determine from Mr. Gee's Amended and Supplemental Complaint whether he seeks damages against any defendant in his or her official capacity. Any such claim, however, clearly would be barred by the Eleventh Amendment. Accordingly, I will enter summary judgment for the official capacity defendants with respect to any claim for damages.

If Mr. Gee prevails on his racial discrimination claim, he may be entitled to injunctive relief. To the extent he seeks such relief against the FAMU defendants in their official capacities, it is obvious that any such relief to which Mr. Gee may become entitled can be adequately provided by means of an injunction against the president of FAMU in his official capacity. Any such injunction would bind not only the president but also FAMU's employees and those in active concert with them, so long as they received notice of the injunction, as could easily be assured. *See, e.g.*, Fed. R. Civ. P. 65(d). There is therefore absolutely no reason to retain any of the other FAMU defendants as parties in their official capacities. The motion of the FAMU defendants other than Dr. Humphries for summary judgment on the claims against them in their official capacities thus will be granted.

Mr. Gee also has sued the FAMU defendants in their individual capacities. They have moved for summary judgment based on qualified immunity. Their qualified immunity defense need not be considered with respect to Mr. Gee's First Amendment and procedural due process claims because on those claims I have determined to enter

summary judgment for all defendants on the merits. With respect to Mr. Gee's Equal Protection claim, the law has long been clearly established that taking adverse employment action based on an employee's race is unconstitutional. If, as Mr. Gee alleges, that is what happened, then defendants will not be entitled to qualified immunity. In short, this is simply a factual dispute, and defendants' motion for summary judgment based on qualified immunity thus will be denied.

Finally, the members of the Board of Regents have moved to dismiss the Amended and Supplemental Complaint. They assert they did nothing wrong. But if, as Mr. Gee alleges, he would have received tenure but for his race, he will be entitled to appropriate injunctive relief against the members of the Board of Regents. Their motion to dismiss thus will be denied.

Accordingly,

IT IS ORDERED:

1. Defendants' motions for summary judgment (documents 123, 126, 166 and 169) are GRANTED IN PART and DENIED IN PART. Summary judgment is entered in favor of all defendants on plaintiff's First Amendment and Due Process claims. Summary judgment is entered in favor of all official capacity defendants on all claims for damages. Summary judgment is entered in favor of all FAMU defendants in their official capacities, other than Dr. Humphries, on all claims for injunctive and declaratory relief. Summary judgment is denied on plaintiff's Equal Protection claims for injunctive relief against Dr. Humphries. Summary judgment is denied on

plaintiff's Equal Protection claims for damages against the FAMU defendants in their individual capacities.

2. Plaintiff's motion for partial summary judgment (document 98) is DENIED.

3. The motion of the defendant members of the Board of Regents to dismiss (document 95) is DENIED.

SO ORDERED this 2d day of December, 1996.

/s/ Robert L. Hinkle
Robert L. Hinkle
United States
District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

GERALD GEE,

vs. Case No. 95-40031-RH

FREDRICK HUMPHRIES, et al.,

JUDGMENT
(Filed Feb. 5, 1997)

Pursuant to and at the direction of the Court, it is

ORDERED AND ADJUDGED that this action be **DISMISSED WITH** prejudice.

Dated February 5, 1997, at Tallahassee, Florida.

ROBERT A. MOSSING, CLERK

/s/ Pam Kuminkoski
By Deputy Clerk: PAM KUMINKOSKI

ENTERED ON DOCKET 2/5/97 BY PK
(Rules 58 & 79(a) FRCP or 32(b)(1) & 55 FRCRP)

Copies mailed to: MATTOX, GRANBERRY, QUILLEN, WALLBERG, MATTIMORE, MCKNIGHT, TURNER, ROBERTS, ROSMAN, COB 1997, VJR, SS

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

Sec. 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE CODE OF LAWS OF THE

UNITED STATES OF AMERICA

TITLE 42 -- THE PUBLIC HEALTH AND WELFARE

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§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

D3

FLORIDA ADMINISTRATIVE CODE

6C3-10.125 Discrimination and Harassment Complaint Procedures.

(1) Policy Statement. It is the policy of the Florida A&M University that each member of the University community be permitted to work or attend class in an environment free from any form of discrimination including race, creed, color, age, handicap, sex, marital status, national origin, veteran status, and sexual harassment, as prohibited by state and federal statues. Refer to University Rule 6C3-10.103 on non-discrimination. Accordingly, this rule establishes procedures whereby a member of the University community may file a complaint of alleged discrimination or harassment. This rule applies to students, faculty, A&P. USPS employees and applicants for admission or employment:

(2) Definition of Discrimination and Harassment.

(a) Discrimination shall include:

1. Limiting, segregating or classifying students, employees, applicants for admission, or applicants for employment, in such a way as to deprive individuals of educational or employment opportunities or otherwise adversely affect individuals because of their race, sex, national origin, marital status or handicap;

2. Denying educational or employment opportunities to individual because of their race, sex,

national origin, marital status or handicap;

3. Providing unequal educational or employment opportunities to individuals because of their race, sex, national origin, marital status or handicap;

4. Providing unnecessarily separate educational programs or activities for individuals because of their race, sex, national origin, marital status or handicap;

5. Entering into contractual or other arrangements which utilize criteria or administrative methods which have the effect of subjecting individuals to discrimination of [sic] which otherwise adversely affect individuals because of their race, sex, national origin, marital status or handicap;

6. The application of any policy or procedure or taking of any admission or employment action that adversely affects a qualified handicapped person as a student, employee, applicant for admission, applicant for employment, a group of students, or a group of employees based on their handicap;

7. The application of any policy or procedure or taking of any admission or employment action concerning the potential or actual marital status of a student, employee or applicant for admission or employment that adversely affects a student, employee, applicant for admission, applicant for employment, a group of students or a group of employees on the basis of potential or actual marital status, or on the basis of head of household or principal wage earner status: however, reasonable practices prohibiting nepotism shall not constitute marital status discrimination;

8. The application of any policy or procedure or taking of any admission or employment action that adversely affects a student, employee, applicant for admission, applicant for employment, a group of students, or a group of employees based on ancestry or place of birth or of cultural, or linguistic characteristics of a national origin group.

9. The application of any policy or procedure or taking of an admission action that adversely affects a student or applicant for admission, belonging to a national origin minority group, unnecessarily based on limited-English-language skills;

10. The application of any policy or procedure, or taking of any admission or employment action, that adversely affects a student, employee, a group of students, or a group of employees based on their race/ethnic category;

11. The application of any policy or procedure, or taking of any admission or employment action, that adversely affects a student, employee, applicant for admission, applicant for employment, a group of students, or a group of employees based on their gender.

(b) Harassment shall include:

1. Any slurs, innuendos or other verbal or physical conduct reflecting on an individual's race, ethnic background, gender or handicapping condition which has the purpose or effect of creating an intimidating, hostile or offensive educational or work environment; has the purpose or effect of unreasonably interfering with the individual's work or school performance or participation;

or otherwise adversely affects an individual's employment or educational opportunities.

2. The denial of or the provision of aid, benefits, grades, rewards, employment, faculty assistance, services, or treatment on the basis of sexual advances or requests for sexual favors.

3. Sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or educational career; submission to or rejection of such conduct is used as a basis for educational or employment decisions affecting the individual; or such conduct has the purpose of effect of unreasonably interfering with an individual's work or educational performance or creating an intimidating, hostile or offensive working or educational environment.

(3) Discrimination and Implementation of Policy.

(a) It shall be the obligation of each vice president to coordinate training of appropriate faculty, administrators, supervisors and employees in implementation of this rule.

(b) Employees. It shall be the responsibility of the Office of the Vice President for Administration to disseminate discrimination and harassment policy and procedures information to all appropriate A&P and USPS employees of the University. They will be apprised of the rule by at least the following methods:

1. Upon adoption of this rule, each current

employee, and thereafter each new employee, shall be furnished with a copy of the University Policy Statement on discrimination and harassment. Said notice shall be accompanied by information stating the office, address, and telephone number of the person or persons designated by the President to receive and investigate complaints arising from matters addressed by this rule. Should this information change at any time, the University shall publish and widely disseminate notice of such change to all employees.

2. Upon adoption of this rule, each current employee and thereafter each new employee have the opportunity to discuss and ask questions, shall fully understand this rule regarding discrimination and harassment including possible discipline for any violation thereof and shall sign a written statement to that effect which shall be placed in the employee's permanent personnel file.

(c) Students. It shall be the responsibility of the Vice President for Student Affairs to disseminate the discrimination and harassment policy information to students. Students shall be made aware of this information by copies of the University Discrimination and Harassment Policy being posted on University bulletin boards and/or printed in one or more publications of general availability and circulation including, but not limited to, the Student Handbook (FANG) and/or the FAMUAN newspaper. Information shall include the office, address, and telephone number of the person or persons designated by the President to receive and investigate complaints arising from matters addressed by this rule. Should this information change at any time, the University shall publish and widely disseminate notice of such change to

the University community.

(d) Faculty and A&P Employees. It shall be the responsibility of the Office of the Vice President for Academic Affairs to disseminate the discrimination and harassment policy and procedures information to all faculty and appropriate A&P employees of the University. They will be apprised of the rule by at least the following methods.

1. Upon adoption of this rule, each current employee, and thereafter each new employee, shall be furnished with a copy of the University Discrimination and Harassment Policy. Said notice shall be accompanied by information stating the office, address, and telephone number of the person or persons designated by the President to receive and investigate complaints arising from matters addressed by this rule. Should this information change at any time the University shall publish and widely disseminate notice of such change to all employee.

2. Upon adoption of this rule, each current employee and thereafter each new employee shall have the opportunity to discuss and ask questions, shall fully understand this rule regarding discrimination and harassment including possible discipline for any violation thereof, and shall sign a written statement to that effect which shall be placed in the employee's permanent personnel file.

(4) Disciplinary Actions.

(a) Any employee of the University who is found to have discriminated against or harassed a student, employee

or an applicant for admission or employment will be subject to disciplinary action up to and including dismissal. The nature of the punishment shall be guided by the seriousness of the offense.

(b) Any student who engages in discrimination against or harassment of any employee or student may be subject to disciplinary action up to and including expulsion.

(c) Any employee in a supervisory capacity who has knowledge of a complaint or a complainable offense as defined under (2), above, involving any of those employees he/she supervises, and who does not take corrective action or report the matters directly to the President or the University EEO/EEA Officer will be subject to discipline up to and including dismissal. The nature of the punishment shall be guided by the seriousness of the offense.

(d) Any employee in a supervisory capacity who has knowledge of a complaint or complainable offense involving another supervisor, or involving an employee(s) supervised by another supervisor, or involving a student(s) in the class(es) of another supervisor's employee and who does not take appropriate corrective action or report the matter directly to the President or University EEO/EEA Officer will be subject to discipline up to and including dismissal. The nature of the punishment shall be guided by the seriousness of the offense.

(e) Any employee or student who knowingly files a false complaint of discrimination or harassment or who knowingly provides false testimony shall be subject to discipline up to and including dismissal or expulsion. The

nature of the punishment shall be guided by the seriousness of the offense.

(5) Procedure for Filing a Complaint.

(a) The President has delegated to the University EEO/EEA Officer the authority and responsibility to receive, conciliate and investigate complaints of discrimination and/or harassment, and to make recommendations to the President concerning disposition of complaints. The EEO/EEA Officer may consult with the vice president under whose administrative authority the person against whom the complaint has been lodged falls (hereafter referred to as the appropriate Vice President) in an attempt to reconcile the complaint.

(b) Any applicant for employment or admission. or an employee or student who believes that he/she is a victim of discrimination or harassment may seek guidance and counseling by requesting an interview with the EEO/EEA Officer. The Complainant will be advised of the options available through University procedures, through the collective bargaining agreement, through the Florida Commission on Human Relations, through the federal Equal Employment Opportunity Commission, and any others that may currently exist or may subsequently be enacted. The EEO/EEA Officer will also provide the opportunity to resolve the complaint informally without invoking the investigatory procedures set forth below. Any discussions at this level will be handled with utmost discretion.

(c) If the complaint cannot be resolved informally, or if the Complainant desires to avail himself/herself of the formal options available pursuant to this rule, then a

written complaint of discrimination and/or harassment must be filed on forms provided. No formal action, including investigation may be undertaken unless and until a formal complaint is filed. This provision shall not limit the University in any way from initiating its own review of the complaint and taking appropriate action should such be deemed warranted under the circumstances presented.

(d) After receiving the signed written complaint, the EEO/EEA Officer shall:

1. Notify the Complainant and the person against whom the complaint has been filed of the complaint, of the allegations contained therein and provide an opportunity for response thereto. At all points of the procedure, the Complainant and the person against whom the complaint has been filed shall be kept informed;

2. Review the complaint and determine if additional information is needed to supplement the complaint;

3. Conduct a full and complete investigation of the complaint;

4. File with the President a written report detailing the findings of the investigation and a recommendation of appropriate action;

5. The investigation conducted pursuant to this section shall be performed on a confidential basis. and all means necessary to safeguard the rights of the person against whom the complaint has been filed, the Complainant, witnesses, and any others involved in the proceedings, shall be utilized.

(e) The report and recommendation of the EEO/EEA Officer shall be submitted to the President. If, after reviewing the report and recommendation, the President determines that the complaint is without merit, the President shall render a written decision dismissing the complaint. If, after reviewing the report and recommendation, the President determines that disciplinary action is warranted, the Complainant and the person against whom the complaint has been filed will be given written notice of the proposed disciplinary action and the reasons therefor. The written notice will also advise the person against whom the complaint has been filed that he/she has the right to appear before the University Personnel Committee at an investigatory interview and submit written or oral evidence on his/her behalf. The Complainant shall be notified of any investigatory interview and shall also have the right to appear and present evidence at that time. After reviewing all of the evidence including any evidence submitted at the investigatory interview, the President shall render a written decision either dismissing the complaint or taking appropriate disciplinary action. A copy of the written decision shall be sent via certified mail and/or hand delivered to the Complainant and to the person against whom the complaint has been filed. If hand delivered, appropriate documentation shall be kept on file to substantiate the actual delivery of the written decision.

(f) Subject to the limitations set forth below in subsections (8) (a) and (b), either the Complainant or the person against whom the complaint was filed may appeal to the President for a review of his original decision, furnishing additional information as desired. After reviewing the original decision and all other evidence upon which the decision was based, the President shall render a

final written decision, either affirming, modifying, or reversing the original decision. A copy of the President's final written decision shall be sent via certified mail to the Complainant and to the person against whom the complaint has been filed.

(6) Time Limitation for Receipt of Formal Complaints, Investigation, and Disposition.

(a) Any written complaint filed under this section must be filed with the EEO/EEA Officer within sixty (60) calendar days after the alleged occurrence of the harassment incident.

(b) Upon receipt of a written complaint, the EEO/EEA Officer shall render a written report and recommendation to the President within thirty (30) working days. This time period may be extended by the EEO/EEA Officer should an extension be necessary in order to ensure a full, fair and complete investigation. The EEO/EEA Officer shall give notice to the parties if such an extension is deemed necessary.

(c) The President shall render a written decision dismissing the complaint or initiating formal action within thirty (30) working days of receipt of the EEO/EEA Officer's report and recommendation. The person against whom the complaint has been filed shall notify the President within ten (10) working days of receipt of the notice of proposed disciplinary action of his/her desire to appear before the University Personnel Committee and present written or oral evidence at an investigatory interview. In cases where an investigatory interview is conducted, the President shall render a written decision dismissing the complaint or taking disciplinary action

within twenty (20) working days after the investigatory interview.

(d) Any appeal to the President must be filed with the President within twenty (20) working days of receipt of the President's original decision. The President shall render a final written decision within twenty (20) working days of receipt of the notice of appeal.

(7) Retaliation Procedure.

(a) Complainants who feel that they have been retaliated against for exercising their rights under this rule shall have the right to file a retaliation complaint with the EEO/EEA Officer.

(b) Retaliation complaints shall be handled in the same manner and utilizing the same procedures set forth above in subsection (5).

(8) Election of Remedies; Complainant's Right to Seek Remedy Outside the University.

(a) The doctrine of election of remedies shall apply to complaints filed pursuant to this rule. Should a Complainant elect to pursue an alternative remedy available to him/her, including the filing of a grievance pursuant to the collective bargaining agreement, the filing of any such grievance shall operate as a waiver of the Complainant's right to file a complaint and avail himself/herself of the procedures available under this rule. Should a grievance be filed pursuant to an alternative remedy and subsequent to the filing of a Complaint under this rule but before proceedings under this rule have been completed, the filing of any such grievance nonetheless

will act as a waiver, and proceedings pursuant to this rule shall be terminated.

(b) The doctrine of election of remedies shall also apply to appeals filed by persons against whom a complaint has been filed. The filing of an appeal pursuant to an alternative remedy by a person against whom a complaint has been filed, including the filing of a grievance under the collective bargaining agreement or the filing of a petition for a hearing pursuant to Section 120.57, Florida Statutes, shall operate as a waiver of the right to appeal to the President pursuant to this rule.

Florida Agricultural and Mechanical University

CHARGE OF DISCRIMINATION/HARASSMENT

NAME (Indicate Mr., Ms., or Mrs.)	TELEPHONE NUMBER (Area Code)
Miss Lisa G. Atkinson	(410) 437-4908
STREET ADDRESS 7936 Caldwell Rd.	HOME (410) 437-4908
CITY, STATE, AND ZIP CODE Pasadena, MD 21122	WORK (can you be reached here?) (410) 767-7017 yes

List the employer, area, college or school, and vice president or other person(s) who discriminated against you.

NAME	Department	Telephone Number
Gerald Gee	Journalism	

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box[es])

- [x] Race
- [ ] Color
- [ ] Religion
- [ ] National Origin
- [ ] Sex
- [ ] Age
- [ ] Marital Status
- [ ] Retaliation
- [ ] Disability

Date most recent or continuing discrimination took place. (month, day, year)

Sept. 20, 1993

The particulars are (if additional space is needed, attach extra sheet[s]:

See attached Letter

RECEIVED
DEC 1 4 05 PM '94
EEO/EEA OFFICE
FAMU

I will advise the EEO/EEA office if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedure. I certify that the above (and attached) statements are true and are accurate documents of incidents which occurred and which I consider discriminating actions and/or forms of harassment.

Lisa G. Atkinson 12-30-94
Signature of Complaint Date

Notary - (required for filing)

Subscribed and Sworn to before me this 30th of August, 1994

Thomas L Lyon

November 1, 1997
My commissions expires

FAMU IS AN EQUAL OPPORTUNITY/ EQUAL ACCESS UNIVERSITY

E1

BEST AVAILABLE COPY

August 29, 1994

Ms. Mary Vaughn, Director
Equal Opportunity Programs
Suite 401 Lee Hall
Florida A&M University
Tallahassee, FL 32307

Dear Ms. Vaughn,

Thank you for this opportunity to express myself as a complaintant in the Discrimination/Harassment case against Instructor Gerald Gee.

In the Fall semester of 1993, our Public Relations (PR) class was engaged in a conversation with Instructor Gee about the fact that the PR students do not have any PR outlets on campus. Instructor Gee was head of the department, so it was only reasonable that he was the best individual to respond to our concerns.

Instructor Gee then informed the class that he was about to say something that may offend some of us. Then he said that "sitting around waiting for someone to give us something creates nigger thinking that will keep us sitting on the back of the bus forever." Offense does not begin to describe what I felt. First of all, he never said that he was about [sic] make a racially derogatory statement that would attempt to lessen the struggles and the mind-set of an oppressed people. Nor did he state that he was about to offend my parents, grandparents, aunts, and uncles who for so many years rode the back of the bus, not because of their nigger thinking, whatever that really means, but because of those in power who thought that Blacks were inferior and deserved nothing but inferior service.

Outrage, anger, and disbelief surges uncontrollably when I recall the incident and think that Instructor Gee had incredible audacity to stand in front of an all Black class at an Historically Black University and disrespect an entire race of people.

Instructor Gee could not possibly know how effected I was by his words that he thought were so innocent. He even went as far as to say that he could not believe that we were not mature enough to handle an adult conversation, and that he chose his words for "shock value". I cannot believe that an adult, someone that students and parents entrust their education to, would disregard what he is supposed to represent in the classroom and use unnecessary, inappropriate language for any reason. I deserve better, I demand better, and I will settle for nothing less.

I truly believe that the words of one's mouth are the meditations of one's heart, and if you say it, you mean it. I cannot promote Florida A&M University, my proud Alma Mater that I love so much, to the many high school and elementary school students that I come in contact with knowing that such behavior as Instructor Gee's is condoned. The point of bringing this issue to the attention of FAMU administration is just that, so they will be aware of what is going on in the school that I call home.

Once again, thank you for contacting me about the continuation of this case. If I may be of assistance in any other capacity or at any other point during the investigation, please do not hesitate to call me. I appreciate your dedication to students and to their concerns. I look forward to hearing the results of the investigation.

Lisa G. Atkinson
7936 Caldwell Rd.
Pasadena, MD 21122
(H) (410) 437-4908
(W) (410) 767-7017
or (410) 523-8346

Sincerely,

Lisa G. Atkinson
Class of 1994

RECEIVED
AUG 22 12 25 PM 1994
EEO/EEA

Florida Agricultural and Mechanical University

CHARGE OF DISCRIMINATION/HARASSMENT

NAME (Indicate Mr., Ms., or Mrs.)	TELEPHONE NUMBER (Area Code)
Mr. Derek G. Austin	(216) 561-0523
STREET ADDRESS	HOME
4160 Feiner Drive	
CITY, STATE, AND ZIP CODE	WORK (can you be reached here?)
Cleveland, Ohio 44122-6834	

List the employer, area, college or school, and vice president or other person(s) who discriminated against you.

Gerald Gee

NAME	Department	Telephone Number
Gerald Gee	School of Journalism	(904) 599-3112

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box[es])

- [X] Race
- [ ] Color
- [ ] Religion
- [ ] National Origin
- [ ] Sex
- [ ] Age
- [ ] Marital Status
- [ ] Retaliation
- [ ] Disability

Date most recent or continuing discrimination took place. (month, day, year)

September - December 1993

The particulars are (if additional space is needed, attach extra sheet[s]:

I will advise the EEO/EEA office if change my address or telephone mber and I will cooperate fully th them in the processing of my arge in accordance with their procedure. I certify that the above (and attached) statements are true and are accurate documents of incidents which occurred and which I consider discriminating actions and/or forms of harassment.

Derek G. Austin 8-19-94
Signature of Complaint Date

Notary - (required for filing)

Subscribed and Sworn to before me

16 of Aug. 1994

Jacqueline M. Grantham

1-6-96
My commissions expires

FAMU IS AN EQUAL OPPORTUNITY/ EQUAL ACCESS UNIVERSITY

On September 1993 Professor Gerald Gee offended many students by the context in which he used the slur "nigger."

During Gee's Monday Case Studies in Public Relations class, the students were discussing with Gee their frustrations with the lack of opportunities available to public relations students.

He became upset toward the students for not settling with the status quo. Gee warned the class he would make a statement many might consider offensive.

"If you do not take advantage of those opportunities available to you, then that is nigger thinking," said Gee, "and that is what will always keep you at the back of the bus."

About four students left the room for about 15 minutes. One student never returned. Many students told Gee that although his point was understood, his statement was not appreciated. Gee's attitude and feelings did not change and he continued class as usual.

Later that week, seven students signed a letter which stated his comments were not appreciated.

After the letter was given to the administration, Gee constantly showed his bitterness, specifically, to those students who signed the letter. For example, Gee told another class he was being fired because of the seven students which caused many rumors and conflicts within the School of Journalism for months.

On another occasion, Gee asked the entire class how they felt if the seven students were to appear on a talk show with him about the issue.

RECEIVED
Aug 19 11 45 AM '94
EEO/AA
FAMU

Florida Agricultural and Mechanical University

CHARGE OF DISCRIMINATION/HARASSMENT

NAME (Indicate Mr., Ms., or Mrs.)	TELEPHONE NUMBER (Area Code)
MS. CHAMANE NIKKOLE KENNEDY	
STREET ADDRESS	HOME
2955-D WOODRICH DRIVE	(904) 877-5823
CITY, STATE, AND ZIP CODE	WORK (can you be reached here?)
TALLAHASSEE, FLORIDA 32301-3685	(904) 921-8152

List the employer, area, college or school, and vice president or other person(s) who discriminated against you.

NAME	Department	Telephone Number
ASST. PROF. GERALD GEE	SCHOOL OF JOURNALISM	(904) 599-3000

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box[es])

- [x] Race
- [ ] Color
- [ ] Religion
- [ ] National Origin
- [ ] Sex
- [ ] Age
- [ ] Marital Status
- [ ] Retaliation
- [ ] Disability
- [x] insensitivity & UNPROFESSIONALISM

Date most recent or continuing discrimination took place. (month,day,year)

FALL/1993

The particulars are (if additional space is needed, attach extra sheet[s]):

DURING A CLASS DECUSSION IN A PUBLIC RELATIONS CASE STUDY CLASS, TAUGHT BY GERALD GEE, THE CLASS LEAD A DISCUSSION ON THE UNBALANCED TREATMENT OF THE VARIED SEQUENCES IN THE SCHOOL OF JOURNALISM. GREALS GEE WAS CONTENT WITH ALLOWING THE CLASS TO DISCUSS THEIR VIEWS AMONGST THEMSELVES. WHEN HE FELT IS WAS APPROPRIATE TO SPEAK, HE SAID THAT THE STUDENTS NEEDED TO GO OUT AND FIND OPPORTUNITES TO ENHANCE THEIR LEARNING EXPERIENCE IN PR. THAT WE COULD NOT WAIT FOR THE SCHOOL OF JOURNALISM TO PROVIDE THOSE OPPORTUNITES FOR US. HIS CONTROVERSIAL STATEMENT, "IT"S THAT SAME NIGGER MENTALITY THAT WILL KEEP YOU ON THE BACK OF THE BUS FOREVER," STEMMED FOR THAT CONVERSATION. MY OWN REACTION WAS OF SHOCK.

I will advise the EEO/EEA office if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedure. I certify that the above (and attached) statements are true and are accurate documents of incidents which occurred and which I consider discriminating actions and/or forms of harassment.

Signature of complainant — Date 8/18/94

Notary - (required for filing)

Subscribed and Sworn to before me

18th of August, 1994

Jana L. Williams

JANA L. WILLIAMS
NOTARY PUBLIC STATE OF FLORIDA
Comm. Exp. Dec. 21, 1996
Bonded Thru Troy Fain Insurance, Inc.

500123

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ADDITIONAL COMMENTS:

I LOOKED AT THE REACTION OF MY CLASSMATES AND EVERYONE LOOKED SURPRISED AT HIS STATEMENT. EVEN THE ONES WHO LATER FELT HE DID NOT MEAN ANYTHING BY THE STATEMENT. I WAS THE SOLE STUDENT WHO QUESTION [sic] HIS REMARK. I RAISED MY HAND IN DISBELIEF OF WHAT HE HAD JUST SAID, AND ASKED HIM DID HE REALIZE WHAT HE HAD SAID AND DID HE REALIZE HE JUST OFFENDED MYSELF AND PROBABLY OTHER STUDENTS. HE SAID HE KNEW WHAT HE SAID, BUT CONTINUED TO POINT OUT THE NECESSITY OF OUR OWN INDULGENCE IN OUR CAREERS AS PR PRACTIONERS. HE DID NOT TAKE MY REMARK SERIOUS ENOUGH TO ADDRESS HIS STATEMENT FULLY AND PROPERLY APOLOGIZE FOR HIS INSENSITIVITY.

DURING HIS CONTINUED TALK AFTER THE STATEMENT TWO STUDENTS LEFT THE CLASS IN DISMAY. ONE DID OT [sic] RETURN. I DO NOT WANT TO BASE MY GRIEVANCE WITH ASSISTANT PROFESSOR GERALD GEE ON THE PLATFORM OF HIS RACIAL MOTIVES FOR MAKING THE STATEMENT. I FEEL THAT IS SOMETHING I WILL NEVER KNOW. BUT I DO FEEL STRONGLY THAT HIS BEHAVIOR WAS INSENSITIVE, UNFAIR, UNPROFESSIONAL, AND HIS TEACHING STRATEGY IS INCONDUCIVE TO A LEARNING ENVIRONMENT.

HIS REMARK ABOUT THE HISTORY OF THE AFRICAN-AMERICAN RACE IS NOT HIS TO SPEAK OF IN SUCH A WAY THAT HE THINKS HE CAN POSSIBLY INCOURAGE [sic] AFRICAN-AMERICAN STUDENTS TO LEARN BY SUCH A DEROGATORY STATEMENT. I

CAN NOT EXCEPT HIS REASONING FOR MAKING THE STATEMENT. I TRULY BELIEVE THAT NOT ONE SINGLE STUDENT FELT THAT SOME LIGHT WAS SHINED ON THEIR CAREER AS A JOURNALIST BY HIS STATEMENT OF HOW AFRICAN-AMERICAN PEOPLE MUST PUT FORTH SPECIAL BEHAVIOR OR OUR PAST WILL REPEAT ITSELF. I'M SORRY, IT DOES NOT SIT RIGHT WITH ME.

/s/ Chamane N. Kennedy
CHAMANE N. KENNEDY

Florida Agricultural and Mechanical University

CHARGE OF DISCRIMINATION/HARASSMENT

NAME (Indicate Mr., Ms., or Mrs.)	TELEPHONE NUMBER (Area Code)
Ms. Tisha Nikki Rumph	(hm.) (904) 877-5823
STREET ADDRESS	HOME (wk.) (904) 488-0420, 413
2655 Woodrim Dr. Apt. "D"	
CITY, STATE, AND ZIP CODE	WORK (can you be reached here?)
Tallahassee, FL 32301	

List the employer, area, college or school, and vice president or other person(s) who discriminated against you.

IE	Department	Telephone Number
Prof. Fred Gee	Journalism (Assoc-Academics)	599-3000

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box[es])

- [x] Race
- [ ] Color
- [ ] Religion
- [ ] National Origin
- [ ] Sex
- [ ] Age
- [ ] Marital Status
- [ ] Retaliation
- [ ] Disability

Date most recent or continuing discrimination took place. (month, day, year)

Sept. 13th 1993

not positive on day

The particulars are (if additional space is needed, attach extra sheet[s]):

Our class was having a discussion about the lack of Asian Relations opportunities offered to us students to the professor. His reply was that our complaining was similar to "nigger mentality which kept us on the back of the bus."

I will advise the EEO/EEA office if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedure. I certify that the above (and attached) statements are true and are accurate documents of incidents which occurred and which I consider discriminating actions and/or forms of harassment.

Tisha Rumph 8.10.94

Signature of Complaint Date

Notary - (required for filing)

Subscribed and Sworn to before me

12th of August, 1994

Notary Public, State of Florida

My Commission Expires Oct. 16, 1994

My commissions expires:

F1

[SEAL]

Florida Agricultural and Mechanical University

Tallahassee, Florida

TELEPHONE: 904/599-3225
FAX: 904/561-2152

ZIP CODE: 32307

FREDERICK S. HUMPHRIES, PRESIDENT

OFFICE OF THE PRESIDENT

August 23, 1994

Mr. Gerald M. Gee
Assistant Professor
School of Journalism,
Media and Graphic
Arts
Florida A&M University

CONFIDENTIAL

Dear Mr. Gee:

This serves as a formal notification of complaints that were filed with the University under University Rule 6C3-10.125. The complaints alleging racial discrimination were forwarded to this office for formal investigation of charges made by several students in the School of Journalism, Media and Graphic Arts in accordance with 6C3-10.125.

The students alleged that the racial discrimination occurred while enrolled in PUR 4001 taught by you in the Fall of 1993. The alleged incident occurred during a class discussion on September 20, 1993.

You are requested to respond in writing to my office by Monday, August 29, 1994 to the allegation of racial discrimination, more specifically, whether statements made by you during your PUR 4001 class on September 20, 1993 were derogatory, racially demeaning or inappropriate. A subsequent meeting will be scheduled to review the complaint and your response.

A fact finding will be conducted to ascertain information in order to respond to the following:

(1) Whether the students experienced racial discrimination by you in the classroom, and

(2) Whether any slurs, innuendos or other verbal or physical conduct reflecting on an individual's race or ethnic background had the purpose or effect of creating an intimidating, hostile or offensive educational environment or had the purpose or effect of unreasonably interfering with the individual's school performance or class participation or whether it affected the individual's educational opportunities.

(3) Determine what action is required by the University for relief.

Please be advised that it is the policy of Florida A&M University that each member of the University community be permitted to work or attend class in an environment free from any form of discrimination including race, color, age, disability, sex, marital status, veteran status, and sexual harassment, as prohibited by state and federal statutes, University Rule 6C3-103. Attached is a copy of this rule and the complaint procedures under University Rule 6C3-10.125. With this writing, you are duly notified that the above-referenced policy prohibits retaliation in

any manner against the complainants directly or indirectly. This includes slurs, innuendos or other verbal or physical conduct which has the purpose or effect of creating an intimidating, hostile, or offensive work/study environment.

Further, please be assured that a thorough and impartial investigation will be made in an effort to obtain the facts relative to charges, and every effort will be made to resolve this complaint as expeditiously as possible.

Should you need to discuss this communication and/or any other factors related to this complaint or investigative procedures, please feel free to contact me at 599-3076.

Sincerely,

/s/ Carrie M. Gavin
Carrie M. Gavin
Assistant Director
Equal Opportunity Programs

CMG/ba

Enclosures

xc: Dr. Frederick S. Humphries
Dr. Richard A. Hogg
Dean Robert M. Ruggles
Dr. James E. Hawkins
Atty. Bishop Holifield
Ms. Mary R. Vaughn

G1

[SEAL]

Florida Agricultural and Mechanical University

Tallahassee, Florida

TELEPHONE: 904/599-3112
599-3718

ZIP CODE: 32307

SCHOOL OF JOURNALISM, MEDIA
AND GRAPHIC ARTS
DIVISION OF JOURNALISM

August 31, 1994

Ms. Carrie M. Gavin
Assistant Director
Equal Opportunity Programs
Florida A&M University

Dear Ms. Gavin:

Your letter of August 23 referenced allegations of racial discrimination and requested my written response to same by Monday, August 29. I called your office last Friday to ask for a full week's time to reply to the complaints that have been made against me, and Mr. Bill Adams, acting in your absence, kindly granted the extension.

I am well aware of the September 20, 1993 classroom incident cited in your letter; indeed, my anguish about it at the time, in the days following and during the past 11 months has been acute. But before I submit a formal written response to allegations stemming from it there are some things I must know. First, what are the specific charges and when and how were they filed with our office? Second, given the actions already taken by the

University in the wake of the incident, what particular assurances can you give me that the investigation this time will be, as you say, "thorough and impartial"? Has the context of such an inquiry been compromised in any way by the President's prior position on the matter and/or by other factors such as published statements which have appeared over the past year? How is it possible now to get a fair hearing?

I also respectfully request copies of all forms, memoranda and any other documents your office has pertaining to the allegations. I wish to fully cooperate with you in resolving this expeditiously, of course, and will file a formal statement within one week after I've received the requested items and your written answers to my questions. Thank you for your cooperation and help in this matter.

Sincerely,

/s/ Gerald M. Gee
Gerald M. Gee

xc: Dean Robert Ruggles
Dr. James Hawkins
Dr. William Tucker
Mr. Thomas Brooks

[SEAL]
Florida Agricultural and Mechanical University
Tallahassee, Florida

TELEPHONE: 904/599-3225
FAX: 904/561-2152

ZIP CODE: 32307

FREDERICK S. HUMPHRIES, PRESIDENT

OFFICE OF THE PRESIDENT

August 31, 1994

Mr. Gerald M. Gee
425 Tucker Hall
Campus

Dear Mr. Gee:

Listed below are the responses to the questions cited in your August 31st letter.

Q. What are the specific charges and when and how were they filed with your office?

A. This information has already been provided to you by the University.

Q. Given the actions already taken by the University in the wake of the incident, what particular assurances can you give me that the investigation this time will be, as you say, "thorough and impartial"?

A. This is the first investigation conducted by our office. No matter what the circumstances, we are concerned only with the facts.

Our office already granted you a two-day extension beyond the August 29th deadline. Due to time constraints, we ask that you submit your response to our office by 5 p.m. on September 2, 1994. If you have not

provided your response by September 2, 1994, you will be deemed to have waived your right to submit same. We are not obligated at this time to submit documents to you pertaining to our investigation.

Sincerely,

/s/ Carrie M. Gavin
Carrie M. Gavin

cc: Dean Robert Ruggles

filename: 09-20-93.eop
contents: response to allegation of racial discrimination

by

Gerald M. Gee
Assistant Professor
School of Journalism, Media & Graphic Arts
Florida A&M University

September 2, 1994

INTRODUCTION:

On Wednesday, August 24, 1994 I received a letter from Carrie Gavin, assistant director of Equal Opportunity Programs (EOP) at Florida A&M University (FAMU). That letter, sent via certified mail to my home, was "a formal notification of complaints that were filed with the University under University Rule 6C3-10.125."[1]

According to the letter, "the complaints alleging racial discrimination were forwarded to (the Equal Opportunity Programs office) for formal investigation of charges made by several students in the School of Journalism, Media and Graphic Arts in accordance with 6C3-10.125. The students alleged that the racial discrimination occurred while enrolled in PUR 4001 taught by (me) in the Fall of 1993. The alleged incident occurred during a class discussion on September 20, 1993."

Mrs. Gavin asked me to respond in writing "by Monday, August 29, 1994 to the allegation of racial discrimination, more specifically, whether statements made by (me) during (my) PUR 4001

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[1] See Gavin to Gee, 8/23/94.

class on September 20, 1993 were derogatory, racially demeaning or inappropriate." She explained that "a subsequent meeting will be scheduled to review the complaint and (my) response."

On Friday, August 26, I called the EOP Office to ask for a full week's time to reply to the aforementioned complaints. Mrs. Gavin was unavailable, but Mr. Bill Adams, acting in her absence, kindly granted the requested extension of time.

On Wednesday, August 31, I delivered to the EOP Office a letter asking for more information about the allegations and the current procedure for investigating the complaints.[2]

On Thursday, September 1, I received two letters from Mrs. Gavin. The first, dated August 26, was postmarked August 31 and sent via certified mail to my home; it merely confirmed my August 26 phone call and the extension to 5:00 p.m. on August 31. The second, dated August 31 and delivered to the School of Journalism Dean's Office, gave brief answers to my previous questions and stipulated a new deadline: 5:00 p.m. September 2, 1994. – "due to time constraints."[3]

As I attempt now to comply with today's deadline for a response to the allegations noted in Mrs. Gavin's initial (August 23) letter, I am encouraged by her statement that "No matter what the circumstances, we are concerned only with the facts." The classroom incident precipitating the allegations has been investigated

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[2] See Gee to Gavin, 8/31/94.

[3] See Gavin to Gee, 8/26/94 and 8/31/94 respectively.

before, both by the Dean of the School of Journalism, Media & Graphic Arts and by the Provost/Vice-President of Academic Affairs, but this marks the first investigation of it by the EOP Office. Perhaps now, after almost a full year, the truth will emerge.

COMMENT IN CONTEXT (What Was Said – and Why):

Eighteen students were enrolled in my Public Relations Case Studies course last fall at FAMU. We met once a week, on Monday nights, and 14 students attended on Sept. 20, 1993 for our third class of the fall term. Those students were:

#/ name:	present on 9/20:	
1. ATKINSON, Lisa	y	
2. AUSTIN, Derek	y	
3. CLARK, Changalar	y	
4. COLE, James		N
5. DANIELS, Charie		N
6. DAVIS, Nikki	y	
7. FLANIGAN, Marlon	y	
8. GREGORY, Dwanna	y	
9. GRIFFIN, Tia	y	
10. KENNEDY, Chamane	y	
11. KING, Doran		N
12. McKINNIE, Selena	y	
13. McPHERSON, Dana	y	
14. MILLER, Alvina	y	
15. PORTER, Curtis	y	
16. RUMPH, Tisha	y	
17. TUCKER, Tamara	y	
18. WILLIAMS, Vecelia		N (excused for illness)

I got to class a few minutes early that night, and as I walked into the classroom two students were discussing the lack of "outlets" FAMU PR

students had for their work. A few others were listening to this discussion; they were quiet but appeared to agree with the basic complaint that "broadcast students have WAMF, newspaper students have the FAMUAN, magazine students have 'Journey' (produced as a class project in the magazine sequence), but we don't have anything like that."

I listened to this awhile myself, then felt I should remind them of something they seemed to be forgetting: that PR people need to be versatile and, as students, they could – and should – get valuable experience by volunteering on all of these "outlets." They claimed these opportunities were closed to them because they were in PR instead of in the other sequences. I suggested that was not the case.

The students then began charging that the School "owed" them their own outlet – something just for PR students. I asked what, in particular, they had in mind and the idea of a student-run PR firm came up. I told them that could be done through the FAMU Chapter of the Public Relations Student Society of America (PRSSA), or, if they wished, apart from that student organization, but that if that's what they wanted, I would help them – and, I ventured, so would Prof. Haskins (the other PR teacher at FAMU). One student – the PRSSA president – started complaining that PR students don't get involved in PRSSA.[4]

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[4] As a former faculty adviser to the National PRSSA Board, I knew of several schools where student-run PR firms had been established by the PRSSA chapters, and, as founding adviser of FAMU's PRSSA Chapter, I have tried in the past to interest

When the students continued to claim that the School owed them an outlet, I told them about some current and former FAMU PR students who, on their own, had gotten lots of good experience for themselves just by *doing it*, and I cited specific examples (e.g., Charles Williams, Betsy Helgager, Veronica Jones, for instance). But the complaining continued, and by now it was about time to formally start class.

I needed a way to get their attention and leave them with something to think about so we could move on. What I said then has been variously reported, but, for the record and to the best of my recollection, what I *actually* said is this:

> *"Now I'm going to say something which may upset some of you, because I'm going to use a term that I, myself, consider offensive. What I'm about to say is not direct at any one of you, or at all of you as a class; it's just something I want you to think about . . .*
>
> *"What I want you to be aware of is that, in this day and age, a person can't sit around waiting for someone to give them something. Anyone who doesn't take advantage of the opportunities that are there, or who doesn't make opportunities for themselves may be guilty of having what some would call a 'nigger mentality' – the sort of thinking that can keep us all on the back of the bus forever."* (emphasis added)

---

students in having such an "outlet" here. Our PRSSA Chapter has done some good public service activities over the years, but that "lack of involvement" is nothing new. Prof. Haskins is the Chapter's faculty adviser and has been for the past two years.

That is what I said, but that seems not to have been what was heard then (by *some* of the students) and it's not what others have said I said. But because of what I said (or more accurately, because of how it was reported), we've had this whole public flap over the so-called "Gee Incident."

(One question I keep getting is whether my remarks were, in fact, "premeditated"; that seems to be a problem for some: that I would *think through* what I said before I said it! I guess my statement *was* premeditated in that I chose my words carefully and was not trying to be flippant or casual. Surely much worse would be to use the "n-word" off-handedly, as some sort of "slip-of-the-tongue, as though it is something I say often. It isn't, and I'm bothered by the notion that my remarks might be more acceptable had they not been "premeditated." Too, note that I said " . . . keep *us all* on the back of the bus . . . " I was identifying myself with my students – or trying to!)

THE REACTION:

My remark that night last September marked the genesis of what some obviously want to see as my exodus from FAMU. Two days later, on September 22, 1994, a few students delivered to my division director, Dr. James Hawkins, a letter signed by six of the students in the course – less than half of those present when I made my remark. (A seventh student also signed although she was not enrolled in any of my courses last fall.)

The students' letter said, in part, that I . . .

> *". . . made an unacceptable comment in relation to our concern about the lack of public relations outlets for students on campus. He said that waiting around for someone to give us these outlets created a 'nigger mentality,' one which will keep us sitting on the back of the bus forever."*

The students provided copies of that letter to my dean, to the vice presidents for university relations and academic affairs, to the president, and to another teacher (Prof. Haskins) – but not to me!

(Other students later confided to me their suspicion that the letter of complaint was probably not the work of just the six [or seven] who signed it. As one student put it, "They got help on that. I know them, and none of them can write that well.")

Subsequently, SJMGA Dean Ruggles conducted an investigation of the "incident," and Provost/ Vice President Hogg met with students from the course and, separately, with me. (The latter meeting, on October 19, 1993, was attended also by Dr. Leedell Neyland, a former dean and vice president for academic affairs at FAMU).

The report of his investigation issued by Dean Ruggles included recommendations which were reasonable at the time. He suggested an official letter of reprimand be placed in my file and, because I was then heavily involved in helping our School get re-accredited and "to give us, collectively, time to assess his ability to rebuild his reputation," that my application for tenure be delayed for a year.

Dr. Hogg's written recommendations to Pres. Humphries were much more prohibitive, however, leading to the decision on November 3, 1993, to not renew my employment with FAMU.

In response to my request for the reasons for that decision, Pres. Humphries sent me a five-page letter on November 22, 1993, in which he repeatedly castigated me for using a "racial slur" and claimed I had violated everything from University Rules to the U.S. Constitution.

So, among other things, I was being accused of accusing – even though that was *not at all my intent*!

RATIONALE and REMORSE:

Having taught at FAMU for 17 years, I felt comfortable enough with – and concerned enough about – my students that night that I attempted to communicate with them in language I knew to be familiar to them. And I told them clearly at the time that I was *not "calling names" nor accusing anyone in the room*; rather, I said what I said to try to make a point. Indeed, no less a popular personage than Queen Latifah, star of the top-rated prime-time television show watched by blacks from October 1993 through January 1994, has used (and uses) the phrase herself to mean what I meant by it.[5]

In saying what I said to the students, I was trying to make a point in their own idiom, to

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[5] See "African-Americans' Viewing Habits on the Rise," *TV Guide*, March 26-April 1, 1994, p. 36) and "Droppin' Knowledge: A Rap Roundtable," *Essence*, September 1992, pp. 83-120. (Note that the latter appeared a full year before my use of the term in class.)

motivate, *NOT* demean. Some students understood my point and nodded in agreement. But for others my words had an effect that was not intended; my attempt backfired, and I said I was sorry when I saw how upset they were. Regrettably, they seemed not to hear my immediate apology and, instead, chose to write the letter.

Those students' reaction that night almost a year ago caused me great anguish at the time and every day since. I spoke with one or two on the third floor hallway of Tucker Hall the very next day, again to say I was sorry, and I read an apology to the full class at our next meeting a week after the incident. I expressed regret in meetings with Dean Ruggles, Dr. Hawkins and Drs. Hogg and Neyland, and I made an apology to my colleagues present at a Journalism Division faculty meeting last October. Yet my apologies have not mollified some who have seized on this as an opportunity to ruin my career as a teacher.

I realize that what I said was a mistake. But it was a mistake in judgment, not intention. I've always had (and have shown) concern for my students – for their education, interests and welfare. My evaluations (including students' comments) over my 17 years at FAMU bear this out. I have been (and am) *TRULY* sorry for causing any student any pain because of the words I used in my unfortunate attempt to make an important point. Yet some at (and beyond) FAMU seem to feel my apologies are not genuine and my remorse not sincere. What must I do to placate them? Leave FAMU?

Since the incident last September, my critics have been disturbed also by what they perceive

as my continuing effort to try to justify the words I used in the classroom. But my efforts have been only to try to preserve my *rights* to use language the same as others have. Were my words inappropriate? Yes, I'm sad to say they were. But they were *NOT* spoken in any derogatory or racially demeaning manner. I have never knowingly insulted any student in any way, nor would I ever do that – at FAMU or anywhere.

So I have learned a valuable lesson in all this and it has come at a great cost, the end of which is not yet known. Some have suggested I'm fighting now only to keep my job, but that's not the case either. Of course I don't want to leave Florida A&M University; FAMU is, as I've said publicly, a great place to teach *and* to learn. Would I like to stay at FAMU as a teacher? Absolutely; I feel I still have much to teach and much to learn. My forced departure from FAMU, at this point or later, would deprive me of that opportunity to continue learning what I clearly need to know about African-American history and culture, and it also would diminish, though perhaps only slightly, the University's own reputation as a great place to get a multicultural education.

CONCLUSION:

I am curious that any students are urging the issue at this point; my rapport with students has been good since the incident (as, indeed, it was before), my Spring term evaluations were favorable and I've seen no decrease in enrollments in my classes then or now. For students, it seems, after the incident was over in the course, it was over, and some are perplexed about the whole non-renewal reaction and continuing attention

being given this matter. Students who know me seem genuinely glad to have me back this Fall.

In any case, I want to cooperate fully with this EOP investigation now, trusting this will be an opportunity to settle this matter fairly and finally. I will appreciate a formal meeting to discuss the complaints and allegations, and will provide you with a list of current and former students (and perhaps others) whom you should contact for their perspectives on the matter. Please let me know if there are any other ways in which I can assist your investigation.

Thank you for Your consideration.

/s/ Gerald M. Gee

[SEAL]

Florida Agricultural and Mechanical University

Tallahassee, Florida

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FREDERICK S. HUMPHRIES, PRESIDENT

OFFICE OF THE PRESIDENT CONFIDENTIAL

October 10, 1994

Dr. Frederick S. Humphries
President
Suite 401 Lee Hall
Florida A&M University
Tallahassee, FL 32307

Dear Dr. Humphries:

Pursuant to Florida A&M University Rule 6C3-10.125 Discrimination and Harassment Complaint Procedures, attached is the investigative report for the racial discrimination complaint filed by several journalism students against Mr. Gerald Gee. Mr. Gee is an Assistant Professsor [sic] in the School of Journalism, Media and Graphic Arts.

As stipulated in the University Rule previously cited, the President is to render a decision dismissing the complaint or initiating formal action within 30 working days (November 22, 1994) of receipt of the EEO/EEA Officer's report and recommendation.

If there are questions or if you desire to discuss this report, please advise.

Sincerely,

/s/ Carrie M. Gavin
Carrie M. Gavin
Acting Director

/cmg
Attachment

Office of Equal Opportunity Programs
Investigative Report
Journalism Students vs Gerald Gee

An investigation was conducted after receipt of a letter alleging racial discrimination by Mr. Gerald Gee was forwarded to the Office of Equal Opportunity Programs on August 5, 1994. The complainants (Ms. Lisa G. Atkinson, Mr. Derek G. Austin, Ms. Chamane N. Kennedy, and Ms. Tisha N. Rumph) charge Mr. Gerald Gee with violating University Rule 6C3-10.125 Discrimination and Harassment Complaint Procedures. In addition to reviewing complainants' written statements, the Office of EOP interviewed Ms. Chamane Kennedy; Ms. Tisha Rumph; Dr. James Hawkins, Director for the Division of Journalism; Mr. James Haskins, professor within the Division of Journalism; and Mr. Robert Ruggles, Dean for the School of Journalism, Media and Graphic Arts. Excluding the complainants, statements were requested from all students that attended Mr. Gee's PUR 4001 class on the evening of the alleged incident. None of those students

responded to the request. A survey was also sent to several students, who were randomly selected from two classes taught by Mr. Gee prior to the alleged incident. A response was received from one student. The randomly surveyed students were not required to identify themselves. The Office of Equal Opportunity Programs also reviewed records from the files of several offices on campus.

The Allegation

The complainants, all African-Americans, filed a complaint alleging that Mr. Gerald Gee, a white Assistant Professor in the Division of Journalism, racially discriminated against them in a class setting.

The Charge of the EOP Office

Upon receiving the complaints, the Office of Equal Opportunity Programs undertook a fact finding investigation to determine the following:

(1) Whether the students experienced racial discrimination by Mr. Gee in the classroom, and

(2) Whether any slurs, innuendos or other verbal or physical conduct reflecting on an individual's race or ethnic background had the purpose or effect of creating an intimidating, hostile or offensive educational environment or had the purpose or effect of unreasonably interfering with the individual's school performance or class participation or whether it affected the individual's educational opportunities.

(3) Determine what action is required by the University for relief.

Findings

On September 20, 1993, students in PUR 4001, Public Relations Case Study, discussed and possibly, at times, complained about the lack of opportunities for Public Relations majors (PR) at Florida A&M University. Mr. Gee, the assistant professor for the course, listened to the conversation. It was common for the students to discuss topics that concerned them, whether those topics were a part of the lecture or not. Some of the students felt that the School of Journalism should provide more opportunities for PR majors to practice their craft as they did for the other sequences, while other students felt that it was the responsibility of the student to make his/her own opportunities.

Mr. Gee entered the discussion by warning the students that he was about to say something that could be considered "offensive". "I needed a way to get their attention and leave them with something to think about so we could move on," said Gee in a statement to the EOP Office. The statement following the warning is what moved the complainants to file their complaints. In his own words, Gee recalls saying, "Anyone who doesn't take advantage of the opportunities for themselves may be guilty of having what some would call a 'nigger mentality' – the sort of thinking that can keep us all on the back of the bus forever." The complainants all agree that the term "nigger mentality" or "nigger thinking" was used by Gee, however they do not recall Gee including himself as being one who could remain on the back of the bus forever. Gee states that he apologized the night the controversial term was uttered. The complainants do not recall Gee apologizing that night even after his statement

was challenged. All of the complainants felt that Gee was insensitive and/or nonchalant about the effects his statement had on the students. It was this perceived attitude, among other things, that resulted in the complainants filing charges.

The immediate reactions of the students included one student putting her head on the desk, several students walking out of the class, and emotions ranging from shock to disbelief to anger. Two of the students sat in a car for over a hour after class was dismissed to discuss Gee's statement and the resulting effects. Two days later, a letter of complaint was filed by six of the students present the evening Gee made the "nigger mentality" statement. Mr. Gee later wrote "that what I said was a mistake". He also submitted to Dean Ruggles and Dr. Hawkins a letter of resignation four days after making his controversial statement. However, they permitted Gee to withdraw his resignation. No disciplinary action has been taken against Mr. Gee.

Summary

The Webster's New World Dictionary of the American Language, Senior Edition, at page 504 defines the word, nigger, as follows:

> "[A] member of any dark-skinned people. A vulgar, offensive term of hostility and contempt, as used by racists."

The word, nigger, is clearly a racial slur. Not only does the dictionary define "nigger" as offensive and vulgar, but Dean Robert Ruggles says he considers the word a racial slur and that it should never be used in a class

setting. Gee's immediate supervisor, Dr. James Hawkins, also felt that Gee exercised poor judgement. Although Gee states his intentions were to "motivate", it is frightening to think that he gave his statement prior thought and still could not decipher that at least one of his students would be offended. Ms. Lisa Atkinson made the following statement in her complaint:

> "Offense does not begin to describe what I felt. First of all, he never said that he was about to make a racially derogatory statement that would attempt to lessen the struggles and the mindset of an oppressed people. Nor did he state that he was about to offend my parents, grandparents, aunts, and uncles who for so many years rode the back of the bus, not because of their nigger thinking, whatever that really means, but because of those in power who thought that Blacks were inferior and deserved nothing but inferior service."

University Rule 6C3-10.125 (2)(a) Discrimination and Harassment Complaint Procedures states that harassment shall include:

> "Any slurs, innuendos or other verbal or physical conduct reflecting on an individual's race . . . which has the purpose or effect of creating an intimidating, hostile or offensive educational or work environment; has the purpose or effect of unreasonably interfering with the individual's work or school performance or participation; or otherwise adversely affects an individual's employment or educational opportunities."

Mr. Gee used a racial slur in an educational environment. Ms. Tisha Rumph and Ms. Chamane Kennedy stated that

they lost respect for Mr. Gee and his ability to teach. Prior to this incident, Ms. Kennedy stated that she "liked" Mr. Gee, he was her advisor and someone she could talk to. After the incident occurred, Ms. Kennedy stated that she dropped him as an advisor and no longer felt comfortable around him. However, all complainants stayed in his class and completed their assignments with passing grades.

The Office of Civil Rights states for a racially hostile environment to exist, it must be "severe, pervasive or persistent." Mr. Gee eventually apologized to the class and tried to make amends to his students by talking with them. Mr. Gee's initial statement has had a lingering divisive and disruptive effect on the School of Journalism and the University. This Office finds that Mr. Gee violated Rule 6C3-10.125, F.A.C.

RECOMMENDATION

Based upon the findings, this was Mr. Gee's first offense of such a nature. However, the trust that was given Mr. Gee by his students was severely damaged. It is inconceivable that a public relations professor who teaches on a daily basis the necessity of knowing your audience and how to achieve maximum results from that audience, could so substantially misjudge the reactions of his number-one audience – his students. This Office recommends two weeks suspension without pay for Mr. Gee's premeditated use of racial slurs that were directed against students in his class. Appropriate action should be taken if Mr. Gee repeats conduct of this nature.

ADDENDUM

Includes:

*Witness Interview with Mr. Robert Ruggles

*Witness Interview with Dr. James Hawkins

*Witness Interview with Ms. Chamane Kennedy

*Witness Interview with Ms. Tisha Rumph

*Witness Interview with Mr. James Haskins

*Charge of Discrimination/Harassment form for Ms. Lisa Atkinson

*Charge of Discrimination/Harassment form for Ms. Chamane Kennedy

*Charge of Discrimination/Harassment form for Ms. Tisha Rumph

*Charge of Discrimination/Harassment form for Mr. Derek Austin

*Response to allegations by Mr. Gerald Gee

K1

[SEAL]

Florida Agricultural and Mechanical University

Tallahassee, Florida

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OFFICE OF THE PRESIDENT

October 24, 1994

PERSONAL AND CONFIDENTIAL

CERTIFIED MAIL - Return Receipt Requested

Mr. Gerald Gee
744 Red Fern Road
Tallahassee, FL 32308

Dear Mr. Gee:

In a letter dated August 23, 1994, you were notified of the fact that a racial discrimination complaint filed against yourself had been forwarded to the Office of Equal Opportunity Programs. The complaint was filed by several journalism students, who have now graduated. The investigation conducted by the Office of Equal Opportunity Programs has revealed that there is merit to the students' complaint. You were found to be in violation of University Rule 6C3-10.125 Discrimination and Harassment Complaint Procedures.

Florida A&M University intends to take the following actions as a consequence thereof:

1. You shall be suspended without pay for a period of two weeks with the starting date of that suspension to begin on November 21,

1994 and ending at the close of business on December 2, 1994.

2) The investigative report conducted by the Office of Equal Opportunity Programs shall be placed in your evaluation file.

3. This letter also constitutes notice that appropriate action will be taken if future conduct of this nature occurs again.

You have ten (10) working days from receipt of this notice to notify the President that you wish to appeal this decision by appearing before the University Personnel Committee.

Sincerely,

/s/ Frederick S. Humphries
Frederick S. Humphries
President

FSH/cmg

cc: Dr. Richard Hogg
Dean Robert Ruggles
Mrs. Carrie Gavin
Ms. Nellie Woodruff
Bishop Holifield, Esq.

L1

[SEAL]

Florida Agricultural and Mechanical University

Tallahassee, Florida

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SCHOOL OF JOURNALISM,
MEDIA AND GRAPHIC ARTS
DIVISION OF JOURNALISM

President Frederick S. Humphries, Ph.D. Nov. 9, 1994
Florida A&M University
Tallahassee, FL 32307

Dear President Humphries:

As indicated in your October 24, 1994 letter, your decision to suspend me without pay for two weeks from November 21 through December 2, 1994 was based on the findings of an investigation conducted by the FAMU Office of Equal Opportunity Programs (EOP).

Among other things, your October 24 letter also informed me that the report of that EOP investigation would be placed in my evaluation file and that I had 10 working days from the date of receipt (October 27) to notify you if I wished to appeal your decision by appearing before the University Personnel Committee.

Despite my November 4, 1994 letter alerting you to my concerns about your decision, the EOP investigation report still had not been sent to SJMGA Dean Ruggles (as of 5:00 p.m. yesterday, November 8) for placement in my evaluation file. Thus, during the entire time allotted for filing a formal appeal of your decision, I've been given no

opportunity to review the report upon which your decision to suspend me was based.

This is just the latest example of the inept and unjust manner in which the complaints of a few students against me last year have been handled. Throughout this ordeal I have tried to follow the rules applicable to my situation only to find that others are not doing so. Under these circumstances, then, I certainly do wish to appeal your decision, and this letter constitutes formal notice of my request for a full hearing on this matter before the University Personnel Committee.

Pending that hearing and/or further decisions about this matter, I shall continue to fulfill my current assignments in and beyond the classroom in accordance with my employment contract.

Sincerely,

/s/ Gerald M. Gee
Gerald M. Gee

cc. Dean Robert Ruggles

M1

[SEAL]

Florida Agricultural and Mechanical University

Tallahassee, Florida

TELEPHONE: 904/599-3225
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FREDERICK S. HUMPHRIES, PRESIDENT

OFFICE OF THE PRESIDENT

December 2, 1994

PERSONAL AND CONFIDENTIAL

CERTIFIED MAIL

Mr. Gerald Gee
744 Red Fern Road
Tallahassee, FL 32308

Dear Mr. Gee:

The University Personnel Committee has upheld the decision to suspend you for two weeks without pay for violation of University Rule 6C3-10.125 Discrimination and Harassment Complaint Procedures, Florida Administrative Code.

In order to alleviate disruptions to your students, the suspension dates have been changed. You shall be suspended without pay for a period of two weeks with the starting date of that suspension to begin on December 20, 1994 and ending at the close of business on January 2, 1995.

The University will implement all actions outlined in my October 24, 1994 letter to you. Pursuant to Rule 6C3-10.125(6)(d), Florida Administrative Code, you may

appeal this decision with me within twenty (20) working days of your receipt of this decision.

Sincerely,

/s/ Frederick S. Humphries
Frederick S. Humphries
President

FSH/cmg

cc: Dr. Richard Hogg
Mr. Robert Ruggles
Mrs. Carrie Gavin
Ms. Nellie Woodruff
Bishop Holifield, Esq.
Darren A. Schwartz, Esq.
Ms. Tisha Rumph
Ms. Lisa Atkinson
Ms. Chamane Kennedy
Mr. Derek Austin

N1

January 9, 1995

By Hand Delivery

President Frederick S. Humphries
Florida Agricultural and Mechanical University
Tallahassee, Florida 32307

Re: Gerald Gee: Notice of Appeal

Dear President Humphries:

Pursuant to Rule 6C3-10.125(6)(d), I am appealing the decision of the University Personnel Committee ("UPC"), as relayed to me in your December 2, 1994 letter, which upheld your initial decision to suspend me for remarks I made in my Public Relations Case Studies (PUR 4001) class on September 20, 1993. I am appealing on two bases: the procedural defects used in pursuing the complaints against me and the lack of merit to the substantive findings.

A. Procedural Defects

The procedural defects in the process which resulted in the proposed two-week suspension are too many to name. The following are the most important ones.

1. Complaints under Rule 6C3-10.125 are supposed to be filed promptly (within 60 days) with the EEO/EEA officer (Ms. Gavin) on specific forms provided by the EEO/EEA officer. As you know, none of these things were done in my case. The proceedings against me began almost one year after the alleged discriminatory/harassing incident.

I was prejudiced by this delay in that students from the PUR 4001 already had graduated and many were unavailable to provide Ms. Gavin with relevant information. Ms. Gavin did not help matters with the manner of her investigation. She sent requests to students concerning what had occurred on September 20, 1993 and asked them to return them almost immediately. (Several of my former students have apprised me of this.) She also insisted that their statements be "notarized" – a requirement that is foregone even in formal court settings (28 U.S.C. § 1746) – thus making it wholly impractical for them to respond in a timely fashion. Curiously, she did not ask to interview me.

2. The UPC, which "upheld" your decision to suspend me, had absolutely no authority to do so. Their function was supposed to be solely as a fact gathering body, and they did not perform that function adequately. Mr. Holifield told me and my attorneys that the UPC hearing was informal and *not* an evidentiary hearing, thus limiting my ability to present evidence on my own behalf.

B. Substantive Findings

1. Ms Gavin's report never states that I violated any provision of Rule 6C3-10.125. Although she writes that I used a racial slur, she never concluded that I had created a racially hostile atmosphere through "severe, pervasive or persistent" conduct. So too, she never concluded that I interfered with any student's performance or participation or adversely affected any of their opportunities. The mere fact that she found that I had used a racial slur is

insufficient to support a finding that I violated some specific provision of Rule 6C3-10.125.

2. As you know, I have repeatedly insisted that any punishment of me for my statements on September 20, 1993 would violate my rights to free speech and academic freedom under our collective bargaining agreement, and the State and Federal Constitutions. I continue (and will continue) to object to the suspension on that ground.

3. I have also stated – and, indeed, it does not seem to be disputed by anyone – that I am being punished where an African American in a similar position would not be. This in itself violated Rule 6C3-10.125, the collective bargaining agreement, and numerous other laws.

Finally, I feel compelled to tell you that the slipshod, and unduly long, manner in which the investigation of me was handled seems to have had the purpose of deflecting my attention from the more important aspects of my career here at Florida A&M, thus allowing others to make purportedly "neutral" criticisms of my work. The whole process has hurt my reputation and hurt me personally.

For the foregoing reasons I ask you to reverse the decision of the UPC and lift the proposed suspension of me.

Very truly yours,

/s/ Gerald M. Gee
Gerald Gee

O1

[SEAL]

Florida Agricultural and Mechanical University

Tallahassee, Florida

Telephone: 904/599-3225
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Frederick S. Humphries, President

Office Of The President

CONFIDENTIAL

January 11, 1995

Certified Mail: Return Receipt Requested

Mr. Gerald Gee
744 Red Fern Road
Tallahassee, FL 32308

Dear Mr. Gee:

Your letter of appeal has been reviewed. However, I am upholding the decision to suspend you for two weeks without pay for violating University Rule 6C3-10.125, Florida Administrative Code.

The suspension dates have been amended. Your suspension shall begin on January 18, 1995 and end at the close of business on January 31, 1995.

The University will also implement the following actions:

1) The investigative report conducted by the Office of Equal Opportunity Programs shall be placed in your evaluation file.

2) This letter also constitutes notice that appropriate action will be taken if future conduct of this nature occurs again.

Sincerely,

/s/ Frederick S. Humphries
Frederick S. Humphries
President

cc: Dr. Richard Hogg
Mr. Robert Ruggles
Mrs. Carrie Gavin
Ms. Nellie Woodruff

No. 98-44

In The

Supreme Court of the United States

October Term, 1997

GERALD GEE,

Petitioner,

vs.

FREDERICK HUMPHRIES, BISHOP HOLIFIELD, CARRIE GAVIN, NELLIE WOODRUFF, ROBERT ROLLINS, RICHARD HOGG, JAMES HEEKIN, JR., ELIZABETH LINDSAY, AUDREA ANDERSON, JULIAN BENNETT, JR., FRANK BROGAN, PAUL CEJAS, CHARLTON DANIEL, JR., PERLA HANTMAN, GWENDOLYN MCLIN, JON MOYLE, DENNIS ROSS, STEVEN UHLFELDER, WELCOM WATSON and CORNELIA SHA'RON JAMES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS FREDERICK HUMPHRIES, BISHOP HOLIFIELD, CARRIE GAVIN, NELLIE WOODRUFF, ROBERT ROLLINS AND RICHARD HOGG

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QUESTIONS PRESENTED

The Respondents dispute the appropriateness of the questions presented by the Petitioner. The questions presented in this case are more accurately defined as follows:

1. Should the determination of the lower courts be disturbed, that the University appropriately disciplined an instructor for offending several students with a racial epithet (attributing a "nigger mentality" that keeps them on the "back of the bus forever") during a pre-class conversation.

2. Should the decision of the lower courts be disturbed, finding that an employee fails to bring a valid procedural due process claim in an instance where he was afforded adequate process and voluntarily bypassed, without good cause, numerous available internal and external administrative and judicial processes.

LIST OF PARTIES

The parties to the litigation are:

Plaintiff (Petitioner): GERALD GEE

Defendants (Respondents): FREDERICK HUMPHRIES, BISHOP HOLIFIELD, CARRIE GAVIN, NELLIE WOODRUFF, ROBERT ROLLINS, RICHARD HOGG, JAMES HEEKIN, JR., ELIZABETH LINDSAY, AUDREA ANDERSON, JULIAN BENNETT, JR., FRANK BROGAN, PAUL CEJAS, CHARLTON DANIEL, JR., PERLA HANTMAN, GWENDOLYN MCLIN, JON MOYLE, DENNIS ROSS, STEVEN UHLFELDER, WELCOM WATSON, and CORNELIA SHA'RON JAMES

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Cited Authorities	v
Opinion Below	1
Statement of Jurisdiction	1
Relevant Laws	1
Statement of the Case	1
A. Petitioner's Employment History.	2
B. The Incident Triggering A Suspension.	4
C. The Reaction to the Epithets.	5
D. The University's Response and Due Process.	8
E. Use of Gee's Epithet On the University Campus.	10
Reasons for Denying the Writ	11
A. This case does not implicate questions of the First Amendment and classroom speech.	13

Table of Contents

Page

B. There is no conflict in the circuits regarding the application of the public concern test. 14

C. The Petitioner was on fair notice regarding the inappropriateness of his conduct. 16

D. There is no conflict among the Circuits regarding the application of the balancing test. 19

E. There is no conflict among the circuits regarding the exhaustion of state judicial remedies prior to bringing a procedural due process claim. 20

1. Petition for Writ of Certiorari Previously Denied Regarding McKinney. 21

2. Facts Of Instant Case Inappropriate For Review. 21

3. McKinney Not In Conflict With Other Circuits. 23

Conclusion 30

TABLE OF CITED AUTHORITIES

Cases Cited: *Page*

Adickes v. Kress & Co., 398 U.S. 144, 26 L. Ed. 2d 142 (1969) 21

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Barkauskie v. Indian River School District, 951 F. Supp. 519 (D. Del. 1996) 26

Bell v. City of Demopolis, 86 F.3d 191 (11th Cir. 1996) 23

Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991) ... 15

Blum v. Schlegel, 18 F.3d 1005 (2d Cir. 1994) 15

Boring v. The Buncombe County Board of Education, 136 F.3d 364 (4th Cir. 1998) 15

Brewster v. The Board of Education of Lynwood Unified School District, 1998 U.S. App. LEXIS 12768 (9th Cir. 1998) 15

Brooks v. George County, 84 F.3d 157 (5th Cir. 1996) 26

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Cleveland Bd. of Education v. Loudermill, 470 U.S. 532 (1985) 29

Table of Cited Authorities

Page

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Cotnoir v. University of Maine System, 35 F.3d 6 (1st Cir. 1994) 24

Cushing v. City of Chicago, 3 F.3d 1156 (7th Cir. 1993) 25

Dambrot v. Central Michigan University, 55 F.3d 1177 (6th Cir. 1995) 15

Dwyer v. Regan, 777 F.2d 825 (2d Cir. 1985) 24, 25

Dykes v. Southeastern Pa. Trans. Auth., 68 F.3d 1564 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1434 (1996) 26

Easter House v. Felder, 910 F.2d 1387 (7th Cir. 1990) 25

Faragher v. City of Boca Raton, 118 S. Ct. 2775, 141 L. Ed. 2d 662 (1989) 17, 19

Ferrara v. Mills, 781 F.2d 1508 (11th Cir. 1986) 15

Friedman v. City of Overland, 935 F. Supp. 1015 (E.D. Mo. 1996) 27

Table of Cited Authorities

	Page
Gardetto v. Mason, 100 F.3d 803 (10th Cir. 1996) ...	15
Gee v. State of Florida Board of Regents, Case No. 96-3741, aff'd, Case No. 97-03061 (Fla. 1st DCA 1998)	1
Grayned v. City of Rockford, 408 U.S. 104 (1972) ...	16
Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) ..	17
Harris v. Bd. of Ed. of City of Atlanta, 105 F.3d 591 (11th Cir. 1997)	23
Haygood v. Younger, 769 F.2d 1350 (9th Cir. 1985) .	25
Hazelwood School District et al. v. Kuhlmeier, 484 U.S. 260 (1988)	15, 19, 20
Kercado-Melendez v. Aponte-Roque, 829 F.2d 255 (1st Cir. 1987), *cert. denied*, 486 U.S. 1044 (1988) ...	24
Korf v. Ball State University, 727 F. 2d 1222 (7th Cir. 1984)	16
Logan v. Zimmerman Brush, Co., 455 U.S. 422 (1982)	28
Martin v. Parrish, 805 F.2d 583 (5th Cir. 1986)	15
McDaniels v. Flick, 59 F.3d 446 (3d Cir. 1995), *cert. denied*, 134 L. Ed. 2d 97, 116 S. Ct. 1017 (1996) .	25

Table of Cited Authorities

Page

McDonough v. Trustees of the University System of New Hampshire, 704 F.2d 780 (1st Cir. 1983) 14

McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110 (1995) 20, 21, 23, 24, 25, 26, 27, 28, 29, 30

Miles v. Denver Public Schools, 944 F.2d 773 (10th Cir. 1991) 20

Moore v. Board of Education of Johnson City, 134 F.3d 781 (6th Cir. 1998) 26, 27

Myers v. Town of Landis, 957 F. Supp. 762 (M.D. N.C. 1996) 26

NLRB v. Sears Roebuck & Co., 421 U.S. 132, 44 L. Ed. 2d 29 (1975) 21

Parratt v. Taylor, 451 U.S. 527 (1981) 23, 24, 26, 28, 29

Pickering v. Board of Education of Township High School District, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968) 14, 15, 19, 20

Plumer v. Maryland, 915 F.2d 927 (4th Cir. 1991) .. 25

Ramsey v. United Mine Workers, 401 U.S. 302, 28 L. Ed. 2d 64 (1971) 21

Reinhart v. City of Maryland Heights, 930 F. Supp. 410 (E.D. Mo. 1996) 27

Table of Cited Authorities

	Page
Roe v. Antle, 964 F. Supp. 1522 (D. N.M. 1997)	26
Schiller v. Moore, 30 F.3d 1281 (10th Cir. 1994)	15
Stana v. School District of City of Pittsburgh, 775 F.2d 122 (3d Cir. 1985)	25
Tinney v. Shores, 77 F.3d 378 (11th Cir. 1996)	23, 24
Tri County Industries, Inc. v. District of Columbia, 104 F.3d 455 (D.C. Cir. 1997)	27, 28
Ward v. Hickey, 996 F.2d 448 (1st Cir. 1993)	15, 16, 19
Waters v. Churchill, 511 U.S. 661, 128 L. Ed. 2d 684, 114 S. Ct. 1878 (1994)	14, 16
Winters v. Board of County Commissioners of Osage County, 4 F.3d 848 (10th Cir. 1993)	25
Zinermon v. Burch, 494 U.S. 113 (1990)	29

Statutes Cited:

28 U.S.C. § 1254(1)	1
Florida Administrative Code § 6C3-10.125	1, 9, 22
Florida Administrative Code § 6C3-10.125(8)(b)	22

Table of Cited Authorities

Page

Florida Arbitration Code, Chapter 682 13

Section 120.57, Fla. Stat. 22

Section 120.57(1), Fla. Stat. 10

Section 120.68, Fla. Stat. 13

United States Constitution Cited:

United States Constitution, Amendment I 1, 12, 13, 14

United States Constitution, Amendment XIV 1

Other Authority Cited:

J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 Georgetown L.J. 399, 420 17

APPENDIX

	Page
Appendix A — Letter From Hawkins To Gee Dated August 23, 1993	1a
Appendix B — Memorandum From Gee To Hawkins Dated September 10, 1993	4a
Appendix C — Memorandum From Gee To Ruggles Dated September 20, 1993	11a
Appendix D — Letter From Members Of The Class To Hawkins Dated September 22, 1993	13a
Appendix E — Memorandum From Gee To Hawkins Dated September 24, 1993	15a
Appendix F — Memorandum From Gee To Ruggles Dated September 24, 1993	22a
Appendix G — Memorandum From Gee To All Students In PUR 40001-001 Dated September 24, 1993	24a
Appendix H — Memorandum From Gee To Hawkins And Ruggles Dated September 27, 1993	26a

OPINION BELOW

The Opinion Below is a Per Curiam Affirmance by the United States Court of Appeals for the Eleventh Circuit.

The Petitioner voluntarily dismissed with prejudice his equal protection claim in federal court and thereafter pursued an unsuccessful lawsuit in state court arising out of these same facts. *Gee v. State of Florida Board of Regents*, Case No. 96-3741 (judgment for defendants), aff'd Case No. 97-03061 (Fla. 1st DCA 1998).

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT LAWS

United States Constitution, Amendment I.

United States Constitution, Amendment XIV.

Florida Administrative Code § 6C3-10.125.

Provisions are set forth in Appendix D of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This case concerns the propriety of the University imposing an eight day suspension on a faculty member for using an insulting racial slur to students. Petitioner, a public relations instructor, overheard two African American students complaining before class about his department's failure to provide them practical opportunities to use their public relations training. Petitioner responded that such complaint could be construed as a "nigger mentality" that keeps them on the "back of the bus forever." His purposes for using this speech were to insult the students as poorly motivated or too lazy to solve this problem; and to silence their complaining, which implicated his own inattention to this problem, so that class could begin. Instead of calming the students down, this insulting speech caused an extended controversy among students that impaired Petitioner's effectiveness as a teacher and

created doubts about his impartiality toward complaining students. Petitioner later acknowledged that some disciplinary action was appropriate for this mistake in judgment. He elected not to protest the suspension under available administrative or state law procedures. The lower courts found that this case presented no substantial constitutional issue of either academic free speech or procedural due process.

A. Petitioner's Employment History.

The Petitioner was employed by Florida A & M University in 1977 with the express understanding that he would attain his doctoral degree. (R6-171, Exh. A, p. 423; Exh. D, pp. 31, 42-5, 48, 135, 138).[1] After the passage of six years, the Petitioner had failed to attain his terminal degree and failed to meet the requirements for tenure. (Pp. 156-7, 204, 268-70, 383, 385, 423; Exh. D, pp. 31, 43-5, 48, 138; Exhs. 22, 23). The Petitioner was removed from the tenure track and allowed to continue to teach in the position of a contractual instructor. As such, he did not have a right of continuing employment beyond the term of his nine month contract.

In 1989, the Petitioner requested that he be allowed to resume the tenure track. His request was granted with the understanding that he remain an annual contract employee, with no expectation of continued employment, and that he would have to attain tenure within six years or reiinquish employment at the University. (Pp. 408, 481-2; Exh. D, pp. 88-9). The Petitioner neither attained his terminal degree nor demonstrated the performance required for tenure. (Pp. 408, 481-2; Exh. D, pp. 88-9). The Petitioner conceded that he was losing his enthusiasm for teaching and that an acrimonious divorce and other personal problems were seriously

1. In the summary judgment granted to the Defendants the facts were construed most favorably to Petitioner/Plaintiff, as they also were in the District Court. It is noteworthy, however, that the most relevant facts cannot be disputed since they were furnished in the Petitioner's own statements, writings, and explanations. Unless designated otherwise, all page references in this section will be to R6-171, Exhibit A, the sworn deposition testimony of the Petitioner and exhibits to the deposition.

affecting his productivity and attitude. (Pp. 156-7, 204, 215, 224-5, 268-70). His Dean urged that he seek medical and psychological assistance. (Pp. 56-7; Exh. 7; Exh. L). Gee exhibited a loss of weight, reported experimentation with drugs and complained how personal problems effected his work. (Exh. P).

As the Petitioner approached the deadline for consideration of his application for tenure, he was advised by Robert Ruggles, the Dean of the School of Journalism, Media and Graphic Arts and by his Division Director that his tenure chances were remote. (Pp. 95, 407; Exh. 22). The Petitioner was told that unless he had engaged in activities that had not yet been brought to the attention of the School (i.e., initiation of new programs or service and research in his area of expertise), he would not be considered as qualified for tenure. (Pp. 95, 408; Exh. 22). This admonition was critical as the Petitioner had not engaged in the type of service or research required for tenure and knew that he would not be able to supplement his credentials or accomplishments. (Pp. 95, 97-8). (Appendix A).

The Petitioner's poor prospects for tenure provoked him to engage in a campaign of antagonistic memoranda, blaming his lack of productivity and service upon his supervisors. (Appendix B). On September 20, 1993, a few hours prior to the start of class, the Petitioner authored an angry memorandum attacking the Dean and Division Director. (Appendix C).

Shortly thereafter, the Petitioner went to his class on Public Relations Class Studies. He arrived several minutes early and as he entered the classroom, overheard two or three students engaged in conversation. (Pp. 91-2, 103-4, 119, 126). The Petitioner did not focus upon the conversation and cannot recall the remarks being made by the students. (Pp. 104, 110). At one point he overheard two students, Marlon Flanigan and Derick Austin, express how they would like to participate in a student operated public relations office. This is the type of extra-curricula activity provided by the faculty of other disciplines. (Pp. 67, 105-8, 110-11, 113-19, 124, 128-9; Exh B, pp. 7-9). At no time did any of the students raise an issue involving race or race relations.

B. The Incident Triggering A Suspension.

As one of only two public relations faculty members, the Petitioner realized that Austin and Flanigan were voicing a concern that reflected upon his own lack of productivity and initiative and an echo of the evaluative criticism raised by the Dean and the Division Director. A few years earlier, Petitioner was involved in preliminary organizational efforts to form a student public relations office, but had allowed the project to die due to a lack of perseverance. (Pp. 61-67, Exh. 10). The Petitioner intended to stop the conversation between Flanigan and Austin and to begin class:

> A (Gee). I was concerned that most everybody had arrived now, and it was time to start taking up the material that we were supposed to do, because that class only met once a week for a semester. And so time was important to us.
>
> * * *
>
> Q I know, sir. But my question is this . . . did you want Mr. Flanigan and Mr. Austin's comments to cease and move on to something else?
>
> A Yes, yes. I wanted us now to move from that discussion into what we needed to talk about that night in terms of the course, the material.

(Pp. 111, 119, 126, 177-9).

He then stated:

> Now I'm going to say something which may upset some of you, because I'm going to use a term that I, myself, consider offensive. What I'm about to say is not directed at any of you, or all of you as a class, it's just something I want you to think about . . .
>
> What I want you to be aware of is that in this day and age, a person can't sit around waiting for someone to

> give them something. Anyone who doesn't take advantage of the opportunities that are there, or who doesn't make opportunities for themselves may be guilty of having what some would call a nigger mentality — the sort of thinking that can keep us all on the back of the bus forever.

(R1-23, ¶ 16; Pp. 126, 128-9, 133). (Exhibit D).

C. The Reaction to the Epithets.

The class reacted with shock, disbelief, and disappointment. (Pp. 110, 180-1, 184-5, 209; Exh. B, pp. 17,23). Students left the classroom while other placed their heads on their desks. (P. 180; Exh. B, p. 17). One student in the class, Chamane Kennedy reacted as follows:

> Are you looking at all our faces right now and realizing we're in shock? Can you please say something to let me know that you did not mean to offend myself and probably others. I raised my hand and I said, "I don't mean to be rude but you have offended me and you have probably offended other students in this class."

(R6-171, Exh. S; Exh. 40, interview of Chamane Kennedy, p. 4).

The Petitioner conceded that he has never heard Austin, Flanigan or any other person in attendance use the epithets "nigger" or "nigger mentality." Further, the Petitioner cannot identify the use of the epithet on campus in the context in which he used the word; namely serving to describe the audience and used to silence or to "motivate" the audience.

Although the remarks did not reflect the name of a particular student in the class who was purportedly exemplifying a "nigger mentality," the comments were directed at the two students who were expressing desires for a student-run public relations office; namely Austin and Flanigan. (Pp. 111, 128-9, 309). In testimony, the Petitioner conceded that he "doubted" that he would have

referred to "nigger mentality," had he not heard Flanigan's and Austin's remarks. (P. 133). In subsequent memoranda, the Petitioner described his intention as a response to the overheard conversation and, "to make a point in their own idiom, to *motivate*." (R6-171, Exh. 32).

It is clear that the Petitioner's use of the phrase "nigger mentality" was *not* a comment on race relations. The Petitioner unequivocally testified that he would have made the same statement in reference to Caucasians or to a group of Caucasians. (Pp. 133-134).

Furthermore, regarding the reference to the back of the bus, the Petitioner admits that neither he nor his ancestors were ever required to ride on the back of a bus or otherwise face oppressive racial discrimination. (Pp. 171-3). The Petitioner does recall riding segregated buses as a child and young man, but in those instances he rode at the front. (Pp. 171-2).

The students were so upset by these intemperate remarks that several authored a complaint delivered to the Division Director which stated in part:

> We feel his comment was derogatory, unethical and most importantly, inappropriate . . . To say the least, we are appalled and outraged that he could stand in front of our class and so blatantly disregard the fact that we as African-Americans are extremely sensitive to the use of racially derogatory terms of any kind. We find his action, in any context, not only racially charged, but extremely unprofessional.

(Exh. 29). Students were particularly offended by the Petitioner's reference to segregation. As one student, Lisa Atkinson, expressed:

> Offense does not begin to describe what I felt. First of all, he never said that he was about to make a racially derogatory statement that would attempt to lessen the struggles of the mind-set of an oppressed people. Nor did he state that he was about to offend my parents, grandparents, aunts, and uncles who for

> so many years rode the back of the bus, not because of their nigger-thinking, whatever that really means, but because of those in power who thought that Blacks were inferior and deserved nothing but inferior service.

(Exh. 24).

Upon observing the reaction of the listeners, the Petitioner realized that he had made a "grievous mistake" and admitted that the statement was racially charged and offensive. (P. 222; Exhs. 27, 32). Two days after the event, on September 22, 1993, the Petitioner was provided with a copy of the students' complaint. (Pp. 185-6, 188-9, 190, 255, 257; Exh. S, Gavin Depo., p. 211; Exh. 13). He acknowledged that the students were deeply hurt but appeared primarily concerned with his tenure application and his ongoing complaints about his supervisors. (Pp. 204, 206, 211; Exhs. 25, 28, 30, 31- p. 4). (Appendix E). He complained that he was badly treated by students for filing the complaint, attacked the students for not going to the "appropriate offices" to complain and questioned their motives. (Pp. 193-5, 206, 210-11, 256; Exhs. 25, 26, 31). (Appendix E). The Petitioner agreed to offer a written apology to the students in the hopes that it would "mollify the students and that no further action" would be necessary. (Exh. 25). (Appendix E, F, G, H).

After considering the student's reaction to his conduct, the Petitioner became convinced that his effectiveness as a teacher was "undermined" and that if he could so misjudge the reaction of an audience, he could no longer teach with confidence. (Pp. 204-6, 212, 247, 249, 250-1; Exhs. 22, 26, 27). He submitted his resignation and immediately began the process of transferring all teaching responsibilities and cleaning out his office. (Appendix E, F, G, H). Upon receipt of his resignation, the Dean and Division Director met with the Petitioner and persuaded him not to act in haste. He consented and resumed his class schedule. (Pp. 228; Exh. S; Exh. 18A).

D. The University's Response and Due Process.

The Dean of the School of Journalism, Media and Graphic Arts, inquired into the incident and recommended the imposition of disciplinary action. (Pp. 220, 279-80; Exh. D, pp. 66-7, 70-3, 91; Exh. G, pp. 47-9, 51, 55). The Petitioner has acknowledged that the Dean's recommendation for discipline was "reasonable" and "appropriate." (P. 281; Exh. 31-p.4).

Thereafter, an investigation was conducted by the Provost, Dr. Richard Hogg. (R6-171, Exh. E, pp. 72-3; Exh. G, pp. 47-9, 55, 59). Hogg spoke with the Petitioner, several students and conferred with the Dean regarding disciplinary action. (R6-171, Exh. G, pp. 47-9, 51, 56, 70-72, 79, 81-3, 85-6; Exh. S; Exh. 19). The Petitioner told Hogg that the students were to be blamed for the resulting disruption. Because of the potential for continuing disruption and a loss of confidence in his ability to teach fairly and without retaliation against the complainants, Hogg suggested that the Petitioner be temporarily replaced and disciplined. (R6-171, Exh. E, p. 74; Exh. G, pp. 99-101; Exh. S; Exh. 22). The Petitioner acknowledging the potential for continued disruption and suspicion of retaliation against students, arranged to have another faculty member grade the tests in his class as a safeguard against allegations of bias. (Pp. 294-5; Exh. 31, Grow Depo. p. 284).

Hogg's recommendations and the Dean's investigatory report were forwarded to the University President, Dr. Frederick Humphries, for action. Given that the Petitioner was on a non-tenured contract, the University was free to not renew his contract for the following year. The University decided to allow his contract to expire. (R6-171, Exh. E, pp. 74-8, 115, 119-20; Exh. G, pp. 100-1; Exh. S, p. 128; Exhs. 25, 28; Exh. C, p. 15).

Pursuant to the University's faculty collective bargaining agreement, the Petitioner was able to grieve any act of discipline or any decision regarding tenure through three grievance steps, culminating in a binding arbitration hearing before a neutral arbitrator. (Pp. 228-30; Exh. C, pp. 6-7; Exh. F, p. 54; Exh. T). Accordingly, the Petitioner, represented by an experienced Union representative, challenged the decision regarding his contract. (Pp.

230-8, 282, 284-8; Exh. C, pp. 10-13; Exh. T). In July 1994, the Board of Regents (BOR) at Step Two of the grievance process, reversed precedent and granted the grievance, directing the University's Equal Opportunity Programs (EOP) Office to investigate the Petitioner's conduct under the processes set forth at Rule 6C3-10.125, F.A.C. (Rule prohibiting discrimination and harassment.) (R6-171, Exh. C, p. 16; Exh. S; Exhs. 30, 30(a)).

In accordance with the resolution of the grievance, the EOP office investigated the students' complaint. This was not an investigation of new complaints, but rather an inquiry into the complaints provided by the students in September 1993. (R6-171, Exh. S, pp. 137-8; Exhs. 31-4; Exh E, pp. 156-7). The complainants expressed appreciation to the EOP office for its pursuit of their concerns. EOP Acting Director, Ms. Carrie Gavin, interviewed the students, reviewed a written response from the Petitioner dated September 2, 1994, and reviewed the contents of the file. (Pp. 298-9, 307; Exh. 32; Exh. S, pp. 137-8, 167, 169; Exhs. 31-4, 39, 40). Throughout the grievance process and EOP inquiry, the Petitioner never asserted that he was not forewarned his actions were prohibited by the anti-discrimination rule. Consistent with action taken in other instances where an employee has first violated Rule 6C3-10.125, F.A.C., Gavin recommended that the President impose a two (2) week suspension. (R6-171, Exh. S, Exh. 44).

Humphries notified the Petitioner that he was inclined to follow the Gavin recommendation and advised him that he could seek a review by the University Personnel Committee (UPC). (R6-171, Exh. S; Exh. 45). The UPC is comprised of three members of the administration and serves as an internal, predetermination sounding board. If unsuccessful before the UPC, the Petitioner could appeal to Humphries the proposed action and thereafter, if unsuccessful, could challenge any disciplinary action taken in a formal state administrative hearing or grieve the matter through binding arbitration pursuant to the collective bargaining agreement. (P. 303).

On November 22, 1994, the Petitioner requested and received a predetermination conference before the UPC. (Pp. 315-18; Exh.

H, pp. 34-6). The Petitioner was represented by legal counsel and was allowed to submit written and oral argument in response to the charges and to call witnesses. (R6-171, Exh. F, pp. 79-80, 99-100). Given that confidential complaints filed by students were to be discussed, observers were excused from the meeting. (R6-171, Exh. C, p. 54; Exh. F, pp. 95-6, 98). The UPC concurred with the EOP recommendation and forwarded its suggestion to the President for a final determination as to the action to be taken. (R6-171, Exh. E; Exh. 57; Exh. H, pp. 44-5).

Humphries met and discussed the charges with the Petitioner. Humphries concluded that some disciplinary action was appropriate and elected to proceed with a two (2) week suspension. (R6-171, Exh. E, p. 214; Exhs. 45, 58, 60). The Petitioner had several procedural avenues to appeal the suspension, including petitioning for a formal hearing pursuant to Section 120.57(1), Fla Stat. (1995), or processing a collective bargaining grievance through binding arbitration. Although represented by counsel and a Union official, the Petitioner did not seek a hearing in the state forum nor did he file a grievance. (P. 315; Exh. C, pp. 33-4, 47-8). (Exhibit I).

The Petitioner began his suspension in January 1995. On January 25, 1995, the District Court heard and denied the Petitioner's request for a temporary injunction. (R1-16). The Court set a hearing date to consider a permanent injunction, but, prior to the hearing date, the University voluntarily abbreviated the suspension action and resolved any pending issue for the purposes of an injunction action.

E. Use of Gee's Epithet On the University Campus.

There is no evidence in the instant record to indicate that any faculty member, employee, or student of the University used the epithet "nigger" or "nigger mentality" in a manner similar to the Petitioner. The suggestion by the Petitioner that racial epithets are routinely tolerated in conversation at the University is unsupported by the record. The Petitioner admits to never having heard the phrase "nigger mentality" spoken on campus prior to or after his

use of the phrase and cannot identify a single instance of the use of a racial epithet by any member of his September 20, 1993 audience.

The Petitioner concedes that his use of "nigger mentality" is unique, but relies upon scant anecdotal evidence to indicate that on rare occasion and in the appropriate pedagogical context, a racial epithet may have been read or spoken on campus. Rather than provide support for the Petitioner, this evidence reflects that the faculty understands the distinction between using these terms in some pedagogical context as opposed to its use as an insult. When used in its appropriate pedagogical context, the phrase may be acceptable, but when used in casual conversation to offend and silence student expression, it is not.

Moreover, the Petitioner's assertions regarding the occasional use of slurs on campus are irrelevant to the determination of this case. There is no evidence to indicate that any Respondent was aware of the purported usage of racial epithets on campus. The Petitioner raises this apparently irrelevant argument and then suggests that it was not the Petitioner's use of the word "nigger" that triggered the suspension.

It was the Petitioner's *insulting* and *offensive* reference to certain individuals having a "nigger mentality" that would keep them on the "back of the bus," that triggered the suspension. There was no legitimate pedagogical purpose for the Petitioner's speech, thus, the issue of whether the phrase would be tolerated in some other context is not relevant.

REASONS FOR DENYING THE WRIT

This case concerns the appropriateness of a disciplinary suspension given to an instructor for having used an offensive racial slur during a pre-class conversation with a few students. Contrary to the exaggerated gloss placed upon this case by the Petitioner, it does not implicate issues of academic freedom or free speech in the classroom. The Petitioner has conceded that his comments were a "mistake," that some disciplinary action was "reasonable," and that he does not intend to use the phrase "nigger mentality" in the future. Consequently, there appears to be no

lingering concerns involving the First Amendment. When this Court addresses an issue of free speech, it must be in the context of a clearly defined and meaningful dispute. This is not the case here.

The Petitioner has disavowed his remarks and has professed that he does not wish to use in the future the phrase "nigger mentality" that keeps some on the "back of the bus forever." Therefore, there is no chilling of his speech. The speech occurred prior to class and outside of an academic exercise. It is for all intents and purpose not a free speech case at all. There is no issue in this case regarding what forms of speech may be regulated during a classroom lesson.

The Petitioner has acknowledged that some discipline was "reasonable." There is no dispute that the epithet used by the Petitioner during a pre-class conversation offended and distracted students from their educational mission and was a serious misjudgment of his audience. Thus, this case turns upon the appropriateness of the degree of discipline (a suspension or a written reprimand) rather than the appropriateness of *any* discipline. The Petitioner could have, and should have, resolved this matter as a collective bargaining grievance.

The University provides a setting free from the distractions of racially offensive conduct and harassment. Rather than provide effective instruction, the Petitioner offended the constituent students who pay to attend and to learn.

Shortly after making his remarks, the Petitioner submitted his own resignation in recognition that his effectiveness as an instructor was lost. Considering that the Petitioner felt that his conduct warranted his final separation from his teaching position, the suspension action on appeal represents a lesser form of a discipline than what the Petitioner would have self-imposed.

Alternatively, the Petitioner raises an issue regarding the granting of summary judgment against his procedural due process claim. The record is clear that the Petitioner was fully afforded a plethora of due process to challenge his suspension. The Petitioner had access to several avenues of procedures within the State

University System, including a grievance procedure culminating in a neutral arbitration or an administrative proceeding before a neutral judge with the right of appeal through the Courts of Florida. He also enjoyed several state judicial avenues of relief, including the Florida Arbitration Code, Chapter 682, Fla. Stat. and, the right to appeal the University's Final Order to the Florida District Courts of Appeal. See Section 120.68, Fla. Stat. In spite of having legal and union representation, the Petitioner abandoned these processes and elected to proceed directly to the United States District Court with his free speech claims. In doing so, the Petitioner prematurely bypassed the University's own grievance system without explanation and without just cause. The Petitioner did not proceed to a final decision of the State University System before commencing his action in federal court. Although the Petitioner may proceed in federal forum with a First Amendment claim, he cannot ignore the processes available to him, and then complain that procedural due process was inadequate.

The courts below correctly determined that the Petitioner should not be permitted to prematurely and without cause simply ignore internal processes for the redress of grievances, and thereafter attack the system for a purported failure to provide such process.

A. This case does not implicate questions of the First Amendment and classroom speech.

The Petitioner urges the Court to consider this case for the purposes of clarifying the balance of academic freedom and the right of the employer to prevent racial insults against students. The facts of this case fail to raise the issue as framed by the Petition. The Petitioner was not involved in a classroom exercise, pedagogical speech or an expression of learning when he spoke of the "nigger mentality" that was responsible for keeping the listeners on the "back of the bus forever." These comments were made during a conversation conducted prior to class, in response to the comments of two students. By interjecting his statements into their conversation, the Petitioner was *not* attempting to teach his course or otherwise carry out an academic activity. He described his purpose as an effort to motivate the listener (to initiate a extra-

curriculum activity) and to silence a conversation between students so class could begin.

Given that the Petitioner's comments were made in a pre-class conversation and not in the context of a classroom lesson, the reasoning set forth in *Connick v. Myers*, 461 U.S. 139 (1992), applies. The protection of speech by a public employee should not be elevated simply because the place of employment is a school. *See Pickering v. Board of Education of Township High School District*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968); *Waters v. Churchill*, 511 U.S. 661, 128 L. Ed. 2d 684, 114 S. Ct. 1878 (1994). Nor do public employees enjoy a higher standard of protection for speech because they are at *other times* engaged in pedagogical conduct. The Petitioner's remarks were made prior to the commencement of class and unrelated to the course content. The coincidence that the conversation occurred while the Petitioner and a few students were waiting for the commencement of class does not render the conduct a pedagogical exercise.

The Petitioner's remarks are accurately characterized as speech, by an educator, made outside of a pedagogical context. This Court has clearly recognized the applicability of the "public concern" test to the speech of educators conversing outside of the conduct of their course. *See Pickering v. Board of Education*, 391 U.S. 563 (1968). The circuits do not require guidance on this issue. The *Pickering* decision and its progeny have served well for three decades.

B. There is no conflict in the circuits regarding the application of the public concern test.

There is no conflict among the circuits regarding the application of the public concern test to the speech of educators. The circuits have consistently applied the principles of *Pickering v. Board of Education* and *Connick v. Myers* to First Amendment cases arising in an educational context. Specifically, the First, Sixth and Tenth Circuits have applied the Pickering Balancing test to an educator's First Amendment free speech claim. *See McDonough v. Trustees of the University System of New Hampshire*, 704 F.2d 780 (1st Cir. 1983) (applied *Pickering* "public concern" test to

situation where college professor was terminated for espousing his views that capitalists exploit others); *Alivoni v. Worcester School Committee*, 777 F.2d 776 (1st Cir. 1985) (applied *Connick* and the "public concern" test to situation where teacher was disciplined for classroom-related speech); *Gardetto v. Mason*, 100 F.3d 803 (10th Cir. 1996) (applied *Connick* and the "public concern" test to situation where public school employee was suspended for making comments); *Schiller v. Moore*, 30 F.3d 1281 (10th Cir. 1994) (applied *Pickering* "public concern" test to situation where public school employee resigned after making comments regarding Board policy); *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995) (applied *Pickering* "public concern" test to facts similar to instant matter where public school employee — basketball coach — was discharged for making comments about the need for more "niggers").

Moreover, the Second, Fourth, Fifth, Ninth and Eleventh Circuits have similarly applied the *Pickering* balancing test. *See Blum v. Schlegel*, 18 F.3d 1005 (2d Cir. 1994) (discussed infra); *Boring v. The Buncombe County Board of Education*, 136 F.3d 364 (4th Cir. 1998) (applied *Pickering* and *Hazelwood*, cited infra, to a situation where teacher's speech involved curriculum-related matters); *Martin v. Parrish*, 805 F.2d 583 (5th Cir. 1986); *Ferrara v. Mills*, 781 F.2d 1508 (11th Cir. 1986); *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991); and *Brewster v. The Board of Education of Lynwood Unified School District*, 1998 U.S. App. LEXIS 12768 (9th Cir. 1998) (applied *Pickering* to situation where public school teacher was disciplined partly for reporting errors regarding school attendance records). It is clear that the circuits are not split.

The Petitioner erroneously suggests the existence of conflict between the decisions of the First Circuit citing *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993), and the court below.[2] The test articulated in *Ward v. Hickey* requires that classroom speech is not

2. The decision of the Eleventh Circuit below was a per curiam affirmance and therefore there is no conflict between the instant case and the reasoning of the Court in *Ward v. Hickey*.

protected, unless it has a "legitimate pedagogic concern." The First Circuit's use of the "legitimate pedagogic concern" test is essentially identical in application to the use of the test of "public concern" test articulated by other circuits including the Eleventh Circuit. Under *Ward v. Hickey*, an instructor that insults or offends individuals with inappropriate racial invective during a pre-class conversation, does not engage in a legitimate pedagogical concern nor does it reflect a matter of "public concern." Thus, there is no conflict among the circuits for the purposes of this case.

C. The Petitioner was on fair notice regarding the inappropriateness of his conduct.

The Petitioner is an instructor in the field of public relations. He was provided with a clearly drafted rule prohibiting sexual and racial harassment. Thereafter, he received training on the application of the rule and authored a memorandum indicating his understanding of the need to avoid discriminatory conduct.

The Petitioner was aware that he was violating the rule when he directed an offensive racial slur at students Austin and Flanigan, and others within earshot. It is beyond cavil that to attribute to a person a "nigger mentality" is the most opprobrious of slurs. In fact, the Petitioner prefaced his remarks with the revelation that he was about to use language offensive to the listeners.

The University, as an employer, has the authority, and indeed the obligation to promulgate rules identifying the parameters of acceptable conduct. *Connick v. Myers, supra. Waters v. Churchill,* 511 U.S. 661, 114 S. Ct. 1878 (1994). The University's rule prohibiting discriminatory acts is well crafted so as to preserve the academic experience in an atmosphere free of distracting or demeaning discriminatory conduct. *Grayned v. City of Rockford,* 408 U.S. 104 (1972). University instructors must be responsible for the likely application of a rule to their conduct. "Common sense, reason and good judgment should have made him cognizant of the fact that his conduct could be cause for {discipline}" and that he "understood both the standards to which he was being held and the circumstance of his conduct." *Korf v. Ball State University,* 727 F. 2d 1222, 1227-8 (7th Cir. 1984). The instant

rule does no offense to academic freedom, but rather furthers the goals of the University.

> Racial slurs more profoundly burden the striving toward educational attainments of their victims than do noise or inane sales patter . . . Racial insults obviously burden the ability of targets to pursue their studies; infuriated and embarrassed, their emotions may push them toward self-protection or retaliation. The University should have an obligation to protect its students from such disabling harassment.

J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 Georgetown L.J. 399, 420.

To accept the Petitioner's argument that he should escape any corrective action because the rule is vague, would invalidate any policy prohibiting racial or sexually offensive conduct or harassment. If the instant rule does not squarely apply to the Petitioner's conduct, then no rule could ever be fashioned that would require the Petitioner to accept some responsibility for his offensive remarks. The Petitioner's proposed limitation upon an employer's ability to take remedial action because of a "vague" rule is contrary to this Court's instruction that an employer is obligated to prevent and correct promptly any discriminatory harassing behavior. *Faragher v. City of Boca Raton*, 118 S. Ct. 2775, 141 L. Ed. 2d 662 (1989).

The Petitioner also argues that, before the employer may take corrective action, the discrimination must be severe and pervasive citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). This argument confuses the standard for establishing the employer's liability under Title VII with the obligation of an employer to take remedial action in response to an employee's harassing or offensive racial or sexual conduct. Contrary to Petitioner's argument, the obligation of the employer is to take appropriate corrective action upon *every* instance of improper offensive racial or sexual harassment. *Faragher, infra.*

The Petitioner's reliance upon *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996), is misplaced as the narrow decision in that case turned upon a unique set of facts not applicable here. For many years, the instructor in *Cohen* utilized an unusual teaching style and lecture content with the approval of his supervisors. Without explanation, his teaching was deemed in violation of a pre-existing anti-harassment rule. The court noted that the University had permitted the instructor to teach in this manner for years without a finding that this conduct was in violation of the rule. The court was critical of the change in enforcement and the inconsistent interpretation of the rule. In *Cohen*, the court did not intend to render a broad observation regarding the promulgation of rules restricting racially offensive slurs.

> We do not decide whether the College could punish speech of this nature if the Policy were more precisely construed by authoritative interpretive guidelines or if the College were to adopt a clearer and more precise policy.

(*Cohen*, at page 971).

Distinguishing the instant case from *Cohen*, the Respondent's rule prohibiting discrimination is applied and enforced in a consistent manner. The Petitioner does not assert that his use of a racial epithet was ever condoned by the University.

Furthermore, even in the absence of a rule, the University is free to take corrective measures when an employee offends others with the use of a racial epithet. The District Court held:

> Mr. Gee also asserts that FAMU's rule against discrimination and harassment, which FAMU cited as grounds for his suspension, is vague. But a university, like any other public employer, need not have a comprehensive code of conduct to govern its employees; public employees may be disciplined for good cause even without a specific written rule prohibiting the conduct at issue. It should have been obvious to Mr. Gee, from either a reading of the

> rule at issue or just as a matter of plain common sense unrelated to any written rule, that this kind of racially derogatory remark could and reasonably would result in corrective or disciplinary action. Mr. Gee could not possibly have thought he was free to direct this kind of remark at his students with impunity.

That court's holding has been mirrored by this Court ("While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, ..." *Faragher* at 1998 U.S. LEXIS 4216, p. 4). Also see *Ward v. Hickey, supra*, 996 F.2d at 454 (". . . we do not hold that a school must expressly prohibit every imaginable inappropriate conduct by teachers.").

D. There is no conflict among the circuits regarding the application of the balancing test.

The Petitioner suggests that the circuits are in need of guidance regarding which balancing test should be used to analyze the regulation of speech in the classroom. (Comparing *Pickering* with *Hazelwood*). Contrary to this assertion, a review of the decisions cited in the Petition reflects that the circuits have uniformly balanced the interests of the public employer and public employee regarding free speech using *Pickering* and *Hazelwood*. *Hazelwood* is not inconsistent with *Pickering*, but rather reflects an application of the principles of *Pickering* to classroom speech.

All of the cases on the balancing of free speech interests, cited by the Petitioner, emanate from the same court decisions and reflect a common reasoning. The seminal case *Pickering*, calls for

> a balance of the interest of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Pickering, 391 U.S. at 568.

Hazelwood School District et al. v. Kuhlmeier, 484 U.S. 260 (1988) and its progeny, including *Miles v. Denver Public Schools*, 944 F.2d 773 (10th Cir. 1991), draw upon the *Pickering* balancing principles, and discusses speech in the educational setting. These cases extend the *Pickering* "public concern" test to recognize that a:

> state's regulation of speech in a public school setting is often justified by peculiar responsibility in providing educational services to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity and that the views of the individual speaker are not erroneously attributed to the school.

Miles, 944 F.2d at 777, quoting *Hazelwood*, 484 U.S. at 271.

Furthermore, it is not clear as to why the instant Petitioner, having failed the *Pickering* balancing test, would complain about not receiving consideration under the more onerous *Hazelwood* analysis. The instant Petitioner failed to meet the broad "public concern" test articulated by *Pickering* and its progeny. Thus, he could not pass the legitimate pedagogical concern test referenced in *Hazelwood*. The Petitioner's speech would not be protected under *Pickering, Connick, Hazelwood, or Miles.* In any event, since the Petitioner's remarks did not constitute pedagogical speech, it does not implicate *Hazelwood* or *Miles*.

E. There is no conflict among the circuits regarding the exhaustion of state judicial remedies prior to bringing a procedural due process claim.

The decision of the Eleventh Circuit below is a per curiam affirmance. The Petitioner does not seek to identify a conflict between this case decision and other circuits, but argues that there is a split between a different case, *McKinney v. Pate*, and other circuits. In addition, the fact that the lower court issued a per curiam affirmance without an opinion leaves this Court without an opinion as to the legal issues which formed a basis of the lower court's

holding. In such a case, this Court has normally declined to exercise review. *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 44 L. Ed. 2d 29 (1975); *Ramsey v. United Mine Workers*, 401 U.S. 302, 28 L. Ed. 2d 64 (1971); *Adickes v. Kress & Co.*, 398 U.S. 144, 26 L. Ed. 2d 142 (1969). Therefore, the instant case does not provide an appropriate basis for certiorari review.

1. *Petition for Writ of Certiorari Previously Denied Regarding McKinney.*

The Petitioner asserts that the decision reached by an en banc panel of the Eleventh Circuit Court of Appeals in *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (en banc), *cert. denied*, 513 U.S. 1110 (1995), should be reversed. As the citation indicates, however, this Court previously had the opportunity to review the decision in *McKinney*, and declined certiorari review. Nothing has transpired since this Court's decision to deny certiorari in *McKinney* that would warrant a revisitation of that case.

2. *Facts Of Instant Case Inappropriate For Review.*

In any event, the issue which the Petitioner is asking this Court to address is whether he should have been required to exhaust all of his state judicial remedies before bringing a federal cause of action for procedural due process violations. In reviewing the facts of the instant case, the Court will find that this is clearly not the appropriate situation for reviewing an issue of this magnitude.

The Petitioner received full pre-suspension due process including:

- notice of complaints;
- right to file position statement with EOP investigator;
- legal and union representation;
- appearance before the UPC with witnesses to respond to the charges; and
- meeting with the University President to respond to the charges.

Thereafter, he enjoyed the right to appeal the suspension under Section 120.57, Fla. Stat., and obtain an administrative hearing with full disclosure of all charges and adverse evidence, discovery, subpoena authority and legal representation. The Petitioner elected not to seek such a hearing. In the event the Petitioner had desired, he could have alternatively sought binding neutral arbitration under the collective bargaining agreement. Such arbitration would have allowed him a full evidentiary hearing with subpoena authority and legal representation.

Throughout this case, the Petitioner has suggested that he was unable to grieve the President's decision to suspend under Rule 6C3-10.125, F.A.C. The Petitioner's brief reflects a misinterpretation of the rule. The Petitioner enjoyed the right to appeal his suspension under processes provided pursuant to the Administrative Procedures Act, culminating in a Final Order by the University which is appealable to the District Court of Appeals. Alternatively, he could have grieved the suspension under the collective bargaining agreement through two steps to binding neutral arbitration. There must be an election of these remedies. The provision of Rule 6C3-10.125(8)(b), F.A.C., merely prevents the appeal to the President after initiation of other litigation.

In any event, it is undisputed that the instant Petitioner elected *not* to grieve his suspension or to seek an administrative hearing. Rather, he abandoned the available processes and filed directly in a federal forum. There is no indication in the record to suggest that the grievance or the administrative hearing would have been futile. The Petitioner cannot explain why he simply abandoned these quick and fair processes. In fact, the Petitioner's union representative, Dr. Tucker, opined that he believes the Petitioner would have sustained his grievance, had one been filed. The Petitioner not only declined to exhaust his state judicial remedies before bringing his federal cause of action, but also failed to exhaust all of the internal remedies provided to him by the University.

The seminal cases in the area of procedural due process have generally involved a plaintiff who had availed himself of

the means provided to him, and therefore had "clean hands" in claiming a denial of due process. The Petitioner in the instant case, however, failed to even pursue the "in house" remedies which were available to him.

3. *McKinney Not In Conflict With Other Circuits.*

Assuming, however, that this Court does not deny the petition on the above grounds, the Respondents contend that the Petitioner's arguments are flawed for a number of additional reasons. Therefore, the petition for a writ of certiorari should be denied for the following reasons as well.

First, the Petitioner has mischaracterized the Eleventh Circuit's decision in *McKinney*. According to the Petitioner's interpretation, the Eleventh Circuit relied exclusively upon *Parratt v. Taylor*, 451 U.S. 527 (1981), in rendering its decision in *McKinney*. Petitioner also contends that *McKinney* conflicts with virtually every other circuit in failing to limit *Parratt* to cases where the conduct in question is truly "random" and "unauthorized." Furthermore, Petitioner offers the cases of *Harris v. Bd. of Ed. of City of Atlanta*, 105 F.3d 591 (11th Cir. 1997); *Bell v. City of Demopolis*, 86 F.3d 191 (11th Cir. 1996), and *Tinney v. Shores*, 77 F.3d 378 (11th Cir. 1996), for the proposition that the Eleventh Circuit has extended *McKinney* to mean that post-termination procedures must be used regardless as to why the initial procedures were inadequate and regardless as to the authority under which the actions were performed.

As an initial matter, the Petitioner's interpretations of *Harris*, *Bell* and *Tinney*, though creative, are nonetheless inaccurate. In *Harris*, the Eleventh Circuit did absolutely nothing to expand the meaning of *McKinney* or the requirements of post-deprivation process. Instead, the court simply stated that it did not need to decide the issue of procedural due process in order to rule on the pending claim of qualified immunity. *Harris*, 105 F.3d at 596. Similarly, in *Bell* the Eleventh Circuit merely restated its holding in *McKinney* and acknowledged that the state of Alabama offered adequate remedies in the form of administrative and state court review. *Bell*, 86 F.3d at 192. Finally, in *Tinney* the Eleventh Circuit

stated that because the plaintiffs had failed to challenge the adequacy of Alabama's post-deprivation remedies, the court had no occasion to decide whether Alabama law in fact provided adequate remedies for relief. *Tinney*, 77 F.3d at 382. Therefore, a more accurate reading of these cases indicates that *McKinney* and its progeny have not expanded the realm of post-deprivation procedures nearly as much as the Petitioner would have this Court believe.

In addition, the Petitioner falsely characterizes *McKinney* as standing for the proposition that a plaintiff must "exhaust" his state remedies before pursuing federal relief for procedural due process claims. The Eleventh Circuit, however, specifically rejected this argument as a basis for its ruling by explicitly stating in its decision:

> McKinney's case fails, therefore, not for want of exhaustion; indeed, *exhaustion is irrelevant to our decision and finds no mention in the opinion.* Rather, McKinney's case fails because he fails to state a procedural due process claim under *Parratt* and its progeny that would give rise to a section 1983 suit.

Id. at 1564. (Emphasis supplied). Therefore, Petitioner's argument that *McKinney* stands for this proposition is utterly misplaced and totally unsupported by the decision itself.

The remainder of Petitioner's argument revolves around the claim that the Eleventh Circuit's interpretation of *Parratt* "conflicts with virtually every other circuit." (Petitioner's Brief, pp. 24-25.) In support of this argument, the Petitioner cites to a number of cases which he claims stand for this proposition.

The cases cited by the Petitioner in his brief, however, do not conflict with *McKinney* for a number of reasons. First, most of the decisions cited to by the Petitioner were decided prior to this Court originally denying certiorari of *McKinney* in 1995. These cases include *Cotnoir v. University of Maine System*, 35 F.3d 6 (1st Cir. 1994), and *Kercado-Melendez v. Aponte-Roque*, 829 F.2d 255, 263 (1st Cir. 1987), *cert. denied*, 486 U.S. 1044 (1988); *Dwyer v.*

Regan, 777 F.2d 825 (2d Cir. 1985); *Stana v. School District of City of Pittsburgh*, 775 F.2d 122 (3d Cir. 1985); *Plumer v. Maryland*, 915 F.2d 927, 928-29 (4th Cir. 1991); *Cushing v. City of Chicago*, 3 F.3d 1156 (7th Cir. 1993), and *Easter House v. Felder*, 910 F.2d 1387 (7th Cir. 1990); *Haygood v. Younger*, 769 F.2d 1350 (9th Cir. 1985); and *Winters v. Board of County Commissioners of Osage County*, 4 F.3d 848 (10th Cir. 1993).

As previously referenced, this Court was presented with a petition for writ of certiorari regarding *McKinney* in 1994. At that time, each of the decisions referenced above had been rendered and were available to this Court for its review. If this Court had determined that a conflict existed between them and the decision in *McKinney*, this Court would have no doubt granted the writ for certiorari at that time. This Court, however, declined to do so and obviously determined that no such conflict existed between the decisions. Therefore, these cases cannot serve as a basis for Petitioner's claim of a conflict between the circuits on the issues addressed in the instant case.

This lack of a conflict is further reinforced by the fact that since the decision in McKinney and this Court's decision to decline certiorari review of *McKinney*, the courts within the circuits cited above have either rendered decisions relying on *McKinney* or citing favorably to *McKinney* as controlling authority or have failed to address the issues raised in *McKinney*, apparently agreeing by their silence with its reasoning. For instance, in *McDaniels v. Flick*, 59 F.3d 446 (3d Cir. 1995), *cert. denied*, 134 L. Ed. 2d 97, 116 S. Ct. 1017 (1996), the Third District Court relied heavily upon *McKinney* and other cases following its line of reasoning and held:

> *We find these cases convincing*. First, as the Supreme Court has held, [t]he constitutional [procedural due process] violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. *Zinermon v. Burch*, 494 U.S. 113, 126, 110 S. Ct. 975 (1990) . . . *We also find most*

> *persuasive the application of Parratt v. Taylor*, 451 U.S. at 527, 101 S.Ct. 1908, to claims that pre-termination decision makers were not impartial . . .

Id. at 460. (Emphasis supplied). *See also Dykes v. Southeastern Pa. Trans. Auth.*, 68 F.3d 1564 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1434 (1996); *Barkauskie v. Indian River School District*, 951 F. Supp. 519 (D. Del. 1996) (citing to *McKinney* and holding that no violation until state refuses to provide due process); *Myers v. Town of Landis*, 957 F. Supp. 762 (M.D. N.C. 1996) (court within Fourth Circuit which relied heavily upon *McKinney* in reaching its decision); *Roe v. Antle*, 964 F. Supp. 1522, 1531-1533 (D. N.M. 1997) (court within Tenth Circuit which described *McKinney* as "Instructive" and "persuasive").

As for the remaining circuits, the Petitioner has likewise misapplied the holdings in these circuits to fit his purposes. As for the Fifth Circuit's holding in *Brooks v. George County*, 84 F.3d 157 (5th Cir. 1996), that court simply held that actions in accordance with an official policy should not be labeled as "random and unauthorized" under *Parratt*. In its holding, that court made absolutely no mention of the decision in *McKinney* or the issues which it addressed, either favorable or unfavorable. Therefore, no conflict with *McKinney* is created by such a holding.

The Petitioner also attempts to support his argument with a case from the Sixth Circuit, *Moore v. Board of Education of Johnson City*, 134 F.3d 781, 785 (6th Cir. 1998). According to the Petitioner, the court in that case rejected the *Parratt* analysis because the teacher in that case was not required to plead nor prove the inadequacy of post-termination state law remedies. (Petitioner's Brief, p. 25). Though this appears to be an accurate summary of that court's ruling, that court also made it very clear that they made that ruling in "the present case", indicating it was a very fact specific determination. *Id.* In addition, that court focused its attention almost solely on the analysis in *Parratt* relating to "random" and "unauthorized" actions. *Id.* In contrast, the court in *McKinney* made absolutely no reference to such a distinction, nor did it make this a basis of its decision. Furthermore, even though the *Moore*

decision was rendered after the Eleventh Circuit's decision in *McKinney*, the *Moore* court makes absolutely no reference to *McKinney* in its ruling.

As for the authority cited from the Eighth Circuit, the Petitioner offers the lone case of *Charchenko v. City of Stillwater*, 47 F.3d 981 (8th Cir. 1995), which merely states that an aggrieved employee has two forums available to him within that circuit, state and federal relief. *Id.* at 984. That case, however, is easily distinguishable from *McKinney* and the instant case. In *Charchenko*, the issue was whether the employee's failure to pursue any administrative remedies in state court barred his claim for federal relief. *Id.* at 984. In the instant case, Gee not only failed to pursue his state remedies, but rather, also declined to exhaust the internal remedies which were available to him at the University. Therefore, since *Charchenko* did not even address the issues faced by the court in *McKinney* and the instant case, it is impossible to tell if it is in conflict with *McKinney* on these vital issues or not.

Perhaps even more telling, however, are the decisions which have been rendered from the Eighth Circuit subsequent to *Charchenko* and *McKinney*. For instance, in *Reinhart v. City of Maryland Heights*, 930 F. Supp. 410 (E.D. Mo. 1996), the Middle District Court for the Eastern District Court of Missouri relied heavily upon *McKinney* and noted that the Eleventh Circuit had recently examined "Supreme Court jurisprudence" on the issue and rendered what it considered to be controlling authority on that issue. *Id.* 412-413. *See also Friedman v. City of Overland*, 935 F. Supp. 1015 (E.D. Mo. 1996) (relying heavily upon *McKinney*, court found that plaintiff had failed to state a cause of action under § 1983 because substantive due process claim does not exist if the claim does nothing more than allege negligent conduct.)

As for the United States Court of Appeals for the District of Columbia, the Petitioner offers the case of *Tri County Industries, Inc. v. District of Columbia*, 104 F.3d 455 (D.C. Cir. 1997). Unlike many of the other cases offered by the Petitioner, this case actually was rendered after the decision in *McKinney*. Like all of the other

decisions, however, it again makes no reference to the holding in *McKinney* or to any of the reasoning relied upon by the Eleventh Circuit in that case.

The court in *Tri County* does make a reference to the fact that an employee pursuing a procedural due process claim need not "exhaust his local remedies." *Id.* at 462. As discussed in more detail above, however, the court in *McKinney* clearly discounted "exhaustion" as a basis for its holding, and therefore all references to this issue as a possible source of conflict are utterly misplaced. In addition, that court also mentioned that "there is a circuit split on this issue." *Id.* at 460. In making this statement, however, that court was clearly referring to the issue of whether the *Parratt* analysis applies to actions by high ranking officials acting within the scope of their authority. *Id.* This narrow issue, though perhaps sharply contested between the circuits, was not even mentioned by the Eleventh Circuit in *McKinney*. Despite Petitioner's apparent desire to confuse the issues in the instant case, this is not one of the issues to be addressed by this Court, nor was it an issue addressed by the lower court in *McKinney*.

Finally, the Petitioner offers a series of previous decisions of this Court in an attempt to undermine the credibility of the decision in *McKinney*. First, he offers *Logan v. Zimmerman Brush, Co.*, 455 U.S. 422 (1982) for the proposition that *Parratt* does not require a resort to a state remedy where the state system itself denied the property interest. In reading this Court's opinion in *Logan*, however, it becomes quite clear that the Court was not overturning its prior decision in *Parratt*, but rather was simply defining further instances which constitute "random and unauthorized" conduct. *Id.* at 435. Again, however, this distinction has no bearing on the instant case or *McKinney* because the Eleventh Circuit did not rely on such a distinction in reaching its decision in *McKinney*. In addition, *Logan* dealt with an extremely fact specific situation, namely where a state commission's actions caused an employee to miss a procedural deadline. In the present case, no such issues would apply. Therefore, this case offers little to the argument that the Eleventh Circuit's decision in *McKinney* contradicts with existing authority.

The Petitioner also offers the case of *Zinermon v. Burch*, 494 U.S. 113 (1990), to support his claim. Petitioner has offered this case for the proposition that *Parratt* is a special case in that only post-deprivation remedies are due. Even assuming, however, that this is the premise of *Zinermon*, this does not in any way conflict with the holding of *McKinney*. In fact, the Eleventh Circuit's decision in *McKinney* cites directly to *Zinermon* for the proposition that:

> A § 1983 action may be brought for a violation of procedural due process, but here the existence of state remedies is relevant in a special sense. In procedural due process claims, the deprivation by state action of a constitutionally protected interest . . . is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law . . . *The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Id.* at 126; *McKinney*, 20 F.3d at 1560.

(Emphasis supplied). Therefore, being that this basic premise is founded on the language set forth in *Zinermon*, it seems impossible to hold that the reasoning of *McKinney* conflicts with *Zinermon*.

The Petitioner contends that the holding in *McKinney* cannot be reconciled with the holding in *Loudermill*. As discussed above, the Eleventh Circuit relied heavily upon *Loudermill* and *Zinermon* in reaching its decision. This fact alone undermines the viability of Petitioner's argument of unreconciled decisions. More importantly, this Court's decision in *Zinermon* was rendered after the decision in *Loudermill*, and therefore the Court took upon itself to reconcile the concept that a violation of procedural due process is not complete until a plaintiff has availed himself of all the state remedies. Having done so, the Eleventh Circuit relied

upon this "reconciled" version of this Court's views and issued its decision in *McKinney*.

Therefore, Petitioner's claims of conflict are totally unfounded, and his petition for a writ of certiorari should be denied in its entirety for the reasons set forth above.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — LETTER FROM HAWKINS TO GEE DATED AUGUST 23, 1993

August 23, 1993

Professor Gerald Gee
744 Red Fern
Tallahassee, FL 32308

Dear Professor Gee:

As we return to work for the 1993-94 academic year, we know you share our hope that this will be a good, productive year. It must be, for the reaccreditation of the Division of Journalism depends on our working hard, together, to get the things done which we must to position ourselves not only for successful February reaccreditation but also for a successful October Board of Regents program review. That is just around the corner.

We shall all be expected to pitch in to get final preparations completed, and our work must be *quality* work.

Some faculty have been or will be assigned specific tasks for the ACEJMC self study and perhaps the BOR program review. Deadlines must be met. The ACEJMC self study is due November 1, and there must be time allowed in advance for the Dean, the Provost, and the President to read it and suggest improvements. So, deadlines will be set accordingly.

One of the biggest concerns we have is that you take very seriously the requirement to include in your *course syllabi* the contributions of women and minorities, not just African Americans, to journalism and mass communication. Dean Ruggles returned from Poynter with a lot of book and article ideas and has asked Mrs. Woody to acquire them for us, to be

placed on a special reserve shelf just for journalism faculty. They have added to that since our return.

It should go without saying that including these contributions in your syllabi is not enough. You must then bring them into your classroom lectures/discussions/demonstrations. Check Mrs. Woody on some new A-V materials which might assist.

You should also know that ACEJMC from 1994-95 onward will require units seeking accreditation to enumerate the ways they prepare their students for work in a multi-cultural society. If we can demonstrate in syllabi and courses that we are doing that now, so much the better.

Syllabi and course handouts for the fall and spring semesters will be inspected by the site visit team. They will also talk with students about what they get in class. It is up to us to see we have that base well covered.

We are optimistic about the BOR review and the reaccreditation, especially if we can get some of our equipment and other financial problems worked out. But we are not kidding ourselves; it will be mighty hard work, but it will be easier if we all cooperate and work as a team. We had that team spirit at Poynter and those of us there saw how well it worked. Let's recapture it and keep it going. It is essential.

It is our sincere hope to visit each journalism class at least once during the fall semester to try to get a sense of your teaching strengths — and weaknesses, if any. We have not been able to do that regularly, and we feel we must, if for no other reason than to steal some of your good ideas.

Appendix A

Now, a more personal word or two.

We ask that you and Professor Haskins schedule a meeting with us early in the semester so we can discuss ways to minimize potential damage to reaccreditation.

In addition, you come up for tenure this year. Unless there have been some productive activities on your part which we do not know about, we are seriously concerned about your ability to receive tenure. You should recall that Dean Ruggles has expressed concern about that in your administrative evaluations at least the last two years. We invite your attention, yet again, to the School's tenure and promotion policy statements.

We hope there is truly no cause for alarm and that you will have a productive 1993-94 year.

Sincerely,

/s/ Robert M. Ruggles
Dean

Sincerely,

/s/ James E. Hawkins, Director
Division of Journalism

APPENDIX B — MEMORANDUM FROM GEE TO HAWKINS DATED SEPTEMBER 10, 1993

Memorandum

Date: September 10, 1993

From: Gerry Gee /s/

To: James Hawkins, SJMGA Journalism Division Director
Robert Ruggles, SJMGA Dean

Subject: recent requests/assignments and on-going concerns

(This is coming to you first, Jim, but is intended for Dean Ruggles as well so I ask you to share it with him. Thank you.).

I. Resumes/Vitae for ACEJMC self-study (per 8/27/93 memo):

The dean's call for yet another revising/updating of faculty resumes is timely, given our preparations for reaccreditation, and surely applies to our new faculty members. However, I think the resume I revised and submitted last April (4/18/93) complies with the recommended format and covered most pertinent information about me. Please recall that version included these ten categories, each clearly specified:

1) Addresses
2) Experience (Academic)
3) Experience (Professional)
4) Education
5) Memberships (Professional & Honorary Organizations)
6) University Service

Appendix B

7) Public Service
8) Publications and Presentations (listing monographs, articles, professional papers, and speeches and seminars)
9) Honors, Awards & Credentials
10) Teaching Specialties

Did I miss something? Do you need more? My summer was spent mostly teaching summer school and relocating locally, so I have no new information to add to my resume — unless, of course, you want it to show new administrative assignments (see below); those, however, haven't resulted in any accomplishments yet.

I'm sure you'll tell me if the resume, I submitted last spring isn't sufficient now for ACEJMC self-study purposes. Unless I hear otherwise from you (Bob), I'll assume it is.

II. PR Sequence report assignment:

Given our need for a well-done sequence self-study report, Jim, I'm willing to help you by taking on that task now.

Your request yesterday that I accept this additional responsibility was a bit of a surprise, though, given that Prof. Haskins is currently the sequence coordinator/head *AND* that along with my normal teaching load this term *and* new duties involving retention at both division and school levels, I'm expected to submit, fairly soon, a strong application for tenure.

Nevertheless, I understand and appreciate your desire to produce good sequence reports for the self-study/reaccreditation process. Having written the previous PR Sequence reports, I know what needs to be said and how to say it. That familiarity

will be an asset, of course, but I'm sure the task still will take more time than you think — time that I had counted on for other things (i.e., my own professional future here).

You (plural now) have expressed some concern about our PR Sequence. I share those concerns. Seems to me we need:

1) more and better cooperation between the PR teachers.
2) a revitalized PRSSA chapter, and
3) greater enthusiasm and visibility by the PR students.

All that would be a *start*, a good one, and the sequence surely will be strengthened by the presence of Marilyn Kern-Foxworth next spring. But we must tackle the obvious problems now, and I want you both to know that *I* want to do that too.

I believe you should re-appoint me to serve as PR Sequence coordinator/head, at least for this reaccreditation period. Weak as it may be now, comparatively, do you not agree the Sequence was stronger when I was the head of it? Besides, it makes sense to have the senior faculty serve as heads of the four sequences, especially at this particular time. (By "senior," understand I mean those in each sequence who have been here the longest -- Keirstead, Gee, Abrams, and Grow respectively -- NOT our oldest faculty members.) If you agree and do this, however, the result is a collection of Four White Males, and the caution/ concern I raised yesterday — that some might have a problem with that — ought to be considered.

In any case, you'll have a report from/about the PR Sequence by (or before) deadline and it will be well done, not half-baked or pressure-cooked. I promise you that.

Appendix B

III. School retention concerns:

I'd like the Minutes of our 8/23 School faculty meeting to be correct. Please recall that it was I, not Arvid, who spoke of the president's concern about retention; you then asked Arvid if it was mentioned at the management meeting, Bob. Remember?

In fact, it's because I raised the subject and suggested a school committee be formed to address it that I was appointed to chair the project in the first place. That's how I recall it.

Small point, I know, but let's give credit where it's due.

(By the way, it was Gee, not Grow, who also brought up the rumor about faculty raises being reduced to fund the so-called "Super Teachers' Awards." Grow chimed in, saying he had heard the same, but Yours Truly first put the matter on the floor.

We Geralds are often confused — with each other, that is!)

Anyway, I'll try to schedule the SJMGA Retention committee's initial/organizational meeting next week and include Mr. Haskins, per your 9/3 memo requesting that. I too want "a good set of statistics" and recommendations to come from our work, and that will happen if we're able to work cooperatively AND get good cooperation from School (*and* University) support staff from whom we'll be seeking data. I may need to call on one or both of you to "grease the skids" but I hope not.

And thanks (anyway), Bob, for designating me to work with Sterlin Adams and the Academic Affairs Office as our

school's "retention data coordinator." Yes, I suppose that's logical.

IV. Tenure and Personnel Relations:

What is less logical is why I'm being given — or at least taking on — these key assignments at this critical point in my own career here. Is the gun being aimed at my foot again, STS?

Your mostly boiler-plate 8/23/93 letter came to me not at home but in an unsealed envelope in my campus/office mailbox. In any case, I was — and am — very distressed to hear that you are "seriously concerned about (my) ability to receive tenure."

You say I should recall the dean's "expressed concern about that in (my) administrative evaluations at least the last two years." I do; on those occasions, I've been reminded of my lack of any record of recent research. You also suggest I look again at the SJMGA tenure/promotion policy statements. I have, and it seems to me one needs a strong history in two of the three criterion areas (teaching, research, service) but not necessarily in all three. My woeful lack of research productivity is more than offset, then, by my record in the areas of teaching and service, a record I believe to be substantially better than most on our faculty. Could I be wrong about this? If so, you haven't said so in or beyond the context of those administrative evaluations.

Admittedly, my general productivity slipped a bit in the past three years, no doubt related to the deterioration of my marriage (ultimately ending, after 23 years, in what has turned out to be a less-than-amicable divorce) and, a year later, my

mother's death (from causes related to her alcohol addiction). Still, I would pit my record of teaching and service, going back to when I joined the faculty here in 1977, against that of any other member of our faculty. Or would that be a mistake?

I was persuaded once to withdraw my initial application for tenure, and I now know that was a mistake. I was led to believe my first application would not be approved (by then-President Walter Smith) because I lacked the terminal degree. Subsequently, the rules changed, of course, and others on our faculty without that degree have received tenure and/or promotions since 1982 while I languished for many years outside the "tenure-stream."

In fact, a close examination of practices here would reveal at least one instance of a faculty member being tenured and promoted to full professor without the (newer) requisite qualifications and another being granted tenure without application review by the school's tenure/promotion committee. Moreover, at least one faculty member received tenure after being given, in the application process, various kinds of administrative support — support which, to date, I have yet to be offered in any form.

Rather than encouragement in and support for this process, what I seem to be getting from you is yet another "you're not doing enough" whack-on-the-hands warning. That's discouraging.

The most recent (but perhaps not final) example of that discouragement is the request (requirement?) In your 8/23 letter to schedule a meeting with you and Mr. Haskins soon "so we can discuss ways to minimize potential damage to

reaccreditation." WHO, pray tell, is supposed to call this meeting? WHAT is this oblique reference to "potential damage" and WHY, after Poynter, am I being put on record as being associated with something so nebulous and negative? If you have some problem with me, please be clear about it. A slur, however vague and veiled, is still a slur, and I don't appreciate it, in print or in person.

I once sat in your office, Jim, and listened to Mr. Haskins express "absolutely no respect" for my professional experience and teaching. Remember that? Well, despite such dogmatic damnation, I'm still willing to do whatever I can to heal this rift between us — assuming it's something that can be healed at all. Yet a closed mind, however cordial on certain occasions, is still a closed mind, and there's only so much *I* can do.

So, gentlemen, what are the next steps?

APPENDIX C — MEMORANDUM FROM GEE TO RUGGLES DATED SEPTEMBER 20, 1993

Memorandum

TO: Dean Ruggles *FROM*: Gerry Gee

RE: resume request(s) *DATE*: 09-20-93

Does the right hand know what the left hand is doing?

That I was among those to whom you addressed your 9/15 memo calling, again, for revised/updated resumes indicates you had not seen a 9/10 memo I wrote to you and Dr. Hawkins and gave to him to share with you.

If you had seen it, you would have known that (1) a version of my resume, revised and submitted earlier (4/18/93), is already on file and covers (I think) all of the essential categories you want included now, and (2) I'd be willing to do another if that earlier one is not sufficient.

My 9/10 memo addressed other concerns too, but I'll not get into those here; your 9/15 memo is enough to deal with now.

For the record, I spoke with Mrs. Travis several times last week to make sure my resume — the 4/93 revision — was on file in your office. At first, I was told that it wasn't — that those you asked us for back then were in Dr. Workman's hands (for whatever reason); later, in another conversation, Mrs. T. Said she did, in fact, have (that version of) my resume. As far as I knew, then, there was not need to do another.

But along comes your 9/15 memo implying, flat-out, a lack of cooperation on my part (and others). I resent that, Bob.

Appendix C

Last week I also checked with Dr. Hawkins to make sure he had gotten my 9/10 memo. He said he had and would "get back to (me)" about it. As of last Friday (9/17) he had not done so.

Well, I hope you see, if you haven't already, what's been on my mind lately; the 9/10 memo spells it out quite clearly. Meanwhile, here's a revised Page 1 of my resume showing my new home address. Add this to what you got from me last April and my resume will then be accurate and, I believe, sufficient for your purposes at this point.

/s/
Gerry

APPENDIX D — LETTER FROM MEMBERS OF THE CLASS TO HAWKINS DATED SEPTEMBER 22, 1993

September 22, 1993

Dear Professor Hawkins:

In a class discussion on 09/20/93 in PUR 4001, Professor Gerald Gee made an unacceptable comment in relation to our concern about the lack of public relations outlets for students on campus. He said that waiting around for someone to give us these outlets created a "nigger mentality," one which will keep us sitting on the back of the bus forever. We feel his comment was derogatory, unethical and most importantly, inappropriate. There are many other terms he could have chosen to convey this message, and as a journalism professor, we are sure he was aware of this.

In a day and age where racial tension is on the rise, and multi-culturalism is taught in the University, we find Professor Gee's use of terms to be especially detrimental to his relationship with many students in our class. To say the least, we are appalled and outraged that he could stand in front of our class and so blatantly disregard the fact that we as African-Americans are extremely sensitive to the use of racially derogatory terms of any kind. We find his action, in any context, not only racially charged, but extremely unprofessional.

To make a statement of this nature, we are more than concerned about how his attitude will affect his position at an historically black university. The words of Professor Gee were unappreciated and most certainly will not be tolerated. We demand the administration to respond accordingly.

Sincerely,

/s/ Lisa G. Atkinson
/s/ Derik G. Austin
/s/ Marlon Flanigan
/s/ Chamane Kennedy
/s/ Tisha Rumph
/s/ Angela Ellis

cc: Dean Robert Ruggles
Dr. Richard Hogg
Leo Sam
Dr. Frederick Humphries
Prof. James Haskins

APPENDIX E — MEMORANDUM FROM GEE TO HAWKINS DATED SEPTEMBER 24, 1993

(SEAL)

Tallahassee, Florida

MEMORANDUM

Date: September 24, 1993

From: Gerald Gee

To: Dr. James E. Hawkins, journalism division director

Subject: concerns about my teaching

Yesterday, at about 9 a.m., you called my home and left a message indicating there was a matter you wanted to discuss with me in your office "as soon as possible." I called you about an hour later and learned then that this was about a letter you had received from some students in my Public Relations Case Studies class, a letter in which they voiced their objections to a remark I had made in class last Monday night.

You asked, in that conversation, for an explanation and I gave you my account of what I recalled saying and why: in short, I tried to put my objectionable remark in context, just as I had done at the time it was first made. My explanation was neither understood nor well received (on both occasions), and I came to your office to see you so we could discuss the matter further.

When I arrived, at 11:12 a.m., you were speaking with someone, so, after waiting a few minutes, I left to chair a

previously called 11:15 meeting of the School Retention Committee. I came back after that and at 12:40 p.m. you gave me an unsigned copy of the students' letter of concern. We then sat in your office and discussed it, during which time you handed me your 9/23 memo which had been prepared prior to my arrival.

I want you to know (again) that I understand our students' objections to the remark I made. Indeed, I anticipated adverse reaction to it before I even said it Monday night and so tried — before, during and after saying it — to put it into context. Sadly, some chose to focus on one word (or phrase) and, therefore, to not hear the point I was trying to make. Others did, however, and I presume that is why their signatures are not affixed to the letter you received. In any case, I have done as you suggested and prepared the enclosed written apology to be read to the whole class when it meets again Monday night (9/27).

It is my fervent hope that my apology will mollify the students and that no further action on this will be necessary.

For the record, I am greatly distressed myself not only about this situation's content (the remark and the uproar it has caused) but also about the manner in which it is being handled.

The students voiced their complaints directly to you, in writing, with copies to several University officials and to another teacher. I was neither sent nor given that letter by the students, so it's clear they meant to formally bring their concern to others but not to me. I believe we have a policy, or at least a widely-known practice, that students who feel something is wrong should attempt to work that out with their teacher(s) before taking it "up the line." That did not happen in this instance;

instead, others were made aware while I was not. Moreover, where the policy/practice calls for a stepwise progression through several levels of university administration, these students chose to publish their complaints simultaneously to four different officials — and, for whatever reason, to a another teacher. Granted, the policy/practice referred to here is for pursuing formal grievances, it is still something used for more general problematic situations as well. But not this time.

You told me the letter was signed by seven students and that an eighth name was included "but in parentheses." Yet you refused my request to see who signed it or to otherwise know just who has complained so I could direct an apology particularly to them. Some apparently understood what I was trying to say Monday night, or at least they were not given (or chose not to take) the opportunity to add their names to the letter. You expect me to apologize to a whole class for what only some are upset about; fine, I'll do that. But this whole thing resembles more a "star chamber" conviction, complete with (to me anyway) anonymous accusers, than an opportunity to address, forthrightly and openly, certain individual and collective concerns. I've had such experiences before but I never thought I'd get that treatment *here*. It seems I was wrong to expect better from this University.

Again, I was aware at the time that my choice of words was going to shock and even offend some. I warned about that before making the remark. I repeatedly said that my comment was *not* directed at anyone in particular, nor was it to be understood as a condemnation of the class in general. And I apologized for it afterwards, at least once, to the whole class (in attendance).

Appendix E

While I would like a chance to direct yet another apology specifically to the students who were disturbed enough to write the letter, I am being denied that opportunity. Why? Apparently because you feel I might take some retributive action against them. It especially saddens me that you would think that, Jim, after working with you for 16 years. Do we not know each other anymore? Have we been so wrong about each other all these years?

Listed below are the students enrolled in PUR 4001-001 (Public Relations Case Studies) according to the Registrar's Office 9/3 and 9/17 — Preliminary Rolls (the latter received on Thursday, 9/23). Class attendance last Monday (9/20) is also shown.

#/name:	*on rolls:*	*9/03*	*9/17*	*present on 9/20:*
1. ATKINSON, Lisa		Y	Y	Y
2. AUSTIN, Derek		Y	Y	Y
3. CLARK, Changalar		Y	Y	Y
4. COLE, James		N*	N*	N
5. DANIELS, Charie		Y	Y	N
6. DAVIS, Nikki		Y	Y	Y
7. FLANIGAN, Marlon		Y	Y	Y (but left early)
8. GREGORY, Dwanna		Y	Y	Y
9. GRIFFIN, Tia		Y	Y	Y
10. KENNEDY, Chamane		Y	N	Y
11. KING, Doran		Y	Y	N
12. McKINNIE, Selena		Y	Y	Y
13. McPHERSON, Dana		Y	Y	Y
14. MILLER, Alvina		Y	Y	Y
15. PORTER, Curtis		Y	Y	Y

Appendix E

16. RUMPH, Tisha	Y	N	Y
17. TUCKER, Tamara	Y	Y	Y
18. WILLIAMS, Vecelia	Y	Y	N
			(excused for illness)

*James Cole attended one class session and told me he was trying to get in the course, but I never saw him after that.

Seven of the 14 students who were in class Monday night put their signatures to a letter and then added the name of another, perhaps to create a majority expression. But I quite agree with you: if even *one* student is so upset by something in a classroom, there is a need to solve the problem and rectify the situation.

Your memo yesterday said you were "willing to discuss this matter (of my remark and the reactions to it) at the earliest opportunity." I wish you had been so "willing" to discuss the issues and concerns cited in my earlier (9/10) memo to you, Jim. It has been fully two weeks since you got that — with my request that you share it with Dean Ruggles — and, other than an "I'll get back to you on it," I've not heard *anything* from you about what I raised there. Worse, perhaps, I learned from a telephone conversation with him late yesterday that Dean Ruggles still has not seen that memo — despite my calling his attention to it in a separate memo last Monday. *Now* you are "willing" to communicate with me about something that concerns us both (and others surely), but *when* were we going to deal with what I raised earlier?

Your memo says you're sure I "know the value of having a classroom climate where the students realize a sense of encouragement, concern and effective direction." Indeed I do, Jim.

Appendix E

What I wonder now, though, is whether you yourself know the value of an administrative climate where the *teachers* experience "a sense of encouragement, concern and effective direction." And if I must ask myself that about *you*, I must ask it about others here as well. But it's not my job to question (or second-guess) how or why some folks do what they do. My job is to *teach*.

The record will show that I've done what I could to be a good (and sometimes even great) teacher here. It's clear that my work in teaching and service, two of the three areas in which faculty are expected to excel, is commendable, even if I've not gotten much public reward or recognition for it. Nevertheless, my potential for continued success in those endeavors here is seriously undermined now by what some few people may think, by perceptions and misunderstanding. I feel minds — and mouths — closing all round us here, a certain skittishness about the possibility of saying something that might offend. That sort of "political correctness" will, I believe, be the death of free expression. I'm sorry to see it happening even/especially here.

In your 8/23 letter to me, you and Dean Ruggles said you were "seriously concerned about (my) ability to receive tenure." I tried to address that in my 9/10 memo but thusfar have gotten no response from either of you. Now, because of *this* incident, I have come to share your doubts about my getting tenure here.

I believe there is, in addition to my public apology to the students, one thing that can be done that will put this matter to rest, firmly and finally, to the satisfaction of some parties. Under the circumstances, I can see no great good coming from my continuing to teach at Florida A&M University. Therefore, for reasons both professional and personal, I hereby resign from my post(s) here, effective at 5:00 p.m. today.

Appendix E

My office will be cleared out over the weekend, and I'll work with you on making an orderly transition for a replacement teacher in my courses. I ask only that you read my enclosed statement to the students in PUR 4001 this Monday night (9/27).

For you help you have been to me at times along the way, I thank you.

encl.

c. Mr. Robert M. Ruggles, SJMGA dean
Dr. Richard A. Hogg, vice president of academic affairs
Dr. Frederick S. Humphries, president
Mr. Leo P. Sam, Jr., vice president of university relations

APPENDIX F — MEMORANDUM FROM GEE TO RUGGLES DATED SEPTEMBER 24, 1993

MEMORANDUM

TO: SJMGA Dean Robert M. Ruggles

FROM: Gerald M. Gee

RE: response to 09/23 memo and call

DATE: 09-24-93

The memo Dr. Hawkins gave me yesterday regarding the "Letter from Students in your Case Studies Class" and your phone call later in the day, in which you informed me you were placing a "letter of reprimand" in my file, were the proverbial straws.

You have broken this camel's back, Bob.

Please ready over the enclosed copies of my response memo to Dr. Hawkins AND the earlier (09/10) memo which you apparently never saw or heard about from him. They begin to tell the story.

Bottom line, though, is this: I'm quitting. I believe my effectiveness as a teacher here has been severely undermined by this latest misunderstanding, the most recent in a series of instances in which I've felt very badly treated by some students and certain other teachers. You know what I mean, I'm sure.

There's no way now to go back and "set the record straight" one experience after another all points the same way: I've outlived my usefulness here. It's time to put this all behind me.

Strange company I'm in: John Hanson, Frank Johnson, Max Shively and others who put a thorn in your side (or a bur

in your saddle) more often than not. And now me. And, like them, I'm leaving FAMU with more gall than gratitude at this point.

(You once said, when John Hanson went from here to teach at Temple U., that Temple "would chew him up and spit him out." Remember that? Is that what happened to me here at Florida A&M?)

The timing is right. Marilyn Kern-Foxworth will be here in the spring; this gives you some time to pull together enough incentive to persuade her to stay and fill the open line position. We do need her here; you don't need me under these circumstances.

As you see, I've asked Dr. Hawkins to read my apology/ statement (enclosed) to the students in Case Studies Monday night. I suspect that whatever concern my leaving causes, it will pass soon and will be much less than what would be if I stayed now. On the other hand, I can think of a few who might actually be prone to celebrate my departure — and I bet they will.

Nothing more to say, in writing or otherwise. In an earlier time, when my hair was short, you probably regarded me as playing "Lt. Fuzz" to your "Gen. Halftrack." Well, I can say now I'm beginning to know that Ollie North has felt like (though I still can't stand his politics), and it truly is a STRANGE feeling.

/s/
Gerry

APPENDIX G — MEMORANDUM FROM GEE TO ALL STUDENTS IN PUR 4001-001 DATED SEPTEMBER 24, 1993

MEMORANDUM

(*To be read to all students in PUR 4001-001 on Monday, 09-27-93.*)

FROM: Gerry Gee DATE: 09-24-93

RE: last week's class

Following a remark I made in class last week, some of you wrote a letter to Dr. Hawkins and provided copies to several others — though not to me. Apparently, the letter was signed by seven (or eight) or you; Dr. Hawkins shared the letter with me but fully protected you from any potential or retribution for it.

That letter, and events before and after it, prompted my resignation from Florida A&M University last Friday (9/24). My last request of Dr. Hawkins was that he read this statement to you tonight since I am no longer an employee of FAMU.

Now about what I said last week: I'm sorry. I tried to prepare you at the time for what I was about to say, tried to explain that it was not directed at anyone in particular (or even at all of you as a class), and I apologized to you afterwards for saying it. I would hope that at least some of you remember that.

In truth, I'm *very* sorry about what I said last week because, in making that remark, I *fundamentally* misjudged my audience — always a grievous mistake in Public Relations. I had thought you were capable of hearing beyond words — even that one — and capable of understanding my concern for you. I was wrong.

Appendix G

You might not think so, but I *did* learn a lot during my 16+ years of teaching here. I'm better for having had this experience, and I believe my former students are better for it too. Some of them anyway. Another PR lesson: You can't please all the people all of the time, but you *must* be honest with yourself.

I'm sorry also that we won't be able to finish this terms together, that I won't be here to see you graduate and that what you'll remember from all this is *this* and not whatever I taught you up to this point. But I wish you all well in any case.

You and I know there will be lots of rumors and TALK about my sudden departure in the wake of what I said last week. If you must add to that, please contribute *facts* and not gossip. Remember: You (most of you) were the "eyewitnesses" so you KNOW *what* happened. Some of you may even know *why* it happened.

You put your signatures to a letter in which you accused me of being (among other things) "unprofessional." Thus, I have chosen to no longer "profess" here. I'm leaving teaching.

Please continue to read widely, proofread carefully, learn all you can and apply your knowledge wisely. Good luck to you.

APPENDIX H — MEMORANDUM FROM GEE TO HAWKINS AND RUGGLES DATED SEPTEMBER 27, 1993

MEMORANDUM

Date: 09-27-93

From: Gerald M. Gee

To: James E. Hawkins, SJMGA Journalism Division Director
Robert M. Ruggles, SJMGA Dean

Subject: follow-up to Friday's meeting

I thank both of you for meeting with me last Friday at 4 p.m. to discuss the problem of my unfortunate use of certain words in the Public Relations Case Studies (PUR 4001) class on Monday, 09-20-93.

You both no doubt were focused on *that* problem as the dilemma-at-hand and were thinking of ways to resolve *it* when I gave you my 09-24 memo referencing earlier concerns (see 09-10 memo) and saying that, in the face of it all, I had decided to resign from teaching at Florida A&M University.

That was how our 4 p.m. meeting began: with my decision, which I presented as *my* solution to several problematic concerns.

To recap, now, some of the major points of that meeting . . .

1) Dr. Hawkins, you asked if I really meant this (what was said in my 09-24 memo); I replied that I did.

Appendix H

2) Dean Ruggles, you said you thought this was "a bit extreme"; I said I didn't think so under the circumstance — that I saw this as a way of resolving several dilemmas at once: the students' concerns about my use of a term in the Case Studies class; a longstanding (and seemingly unresolvable) personality clash with another faculty member (Mr. James Haskins); the matter of my coming up for tenure (again) this year and feeling (a) no sincere administrative support for that and (b) that this incident (prompted by the students' copying their letter to the highest levels of administration) would prejudice any application I might make for tenure. Neither you nor Dr. Hawkins took that moment to address those concerns one-by-one; instead, you both expressed, again, your feeling that my decision was "extreme."

3) I told you that, simply put, I wasn't enjoying what I was doing here anymore, that I had lost the energy and enthusiasm I once had and so felt I am no longer the teacher you need for our (Public Relations) students, and that my decision was based on all that and more.

4) I said I believed my leaving now would make it easier on all concerned. You both said you didn't think so, and you, Dean, inquired about my health — if this was a physical or mental problem. I said I didn't think so. You asked if I had talked about the stresses of work with a psychologist, and I said I had not.

5) Addressing some particular points of my 09-24 memo, Dr. Hawkins reiterated his rationale for not divulging the names of the students who had signed the 09-22 letter of complaint, to which I said simply, "that's

okay." You also reminded me that you *did* act on one point raised in my 09-10 memo, namely, my suggestion that a change be made in the heading of the Public Relations Sequence. (That action, by the way, came in the form or your 09-20 memo to me and Mr. Haskins, six working days after I had discussed it in my earlier memo — which, itself, was an immediate follow-up to our previous day's telephone conversation in which you said, among other things, that you were "thinking of making a change in the PR Sequence Head" post.)

6) You both agreed that my prepared statement/apology was well written and acceptable (at least to you).

7) Finally, after much discussion, you both asked me to delay cleaning out my office and to take the weekend to think about my decision and to meet with both of you on Monday (today) before doing anything else. I agreed to meet again but said I would begin to clear my office (we joked that it needed a good cleaning anyway) and that I wasn't planning to meet my classes on Monday. Dr. Hawkins agreed to read my statement/ apology to the students in Case Studies Monday night.

Subsequently, with the help of Dr. Abrams, I began cleaning out my office over the weekend. (I had not discussed my decision with anyone other than yourselves, and reluctantly disclosed it to Mike only after we met you at the elevator Sunday evening and he commented to me about how depressed you seemed, Jim.) As you have seen, some of my papers, etc. have been removed but much still remains. I'd like to finish that process this week.

Appendix H

Also, in a phone conversation prior to my first scheduled class, you (Jim) asked if my decision stood and if I was "going forth with the letter." I told you that, in fact, I had thought about it this weekend but could not bring myself to any change in the decision at that point. I said also that, before doing anything else, I would meet with you and Dean Ruggles at some time today convenient to us all. You suggested a 3 p.m. meeting, and I agreed to see you both at that time.

I must tell you I feel awful about this. To think that my 15+ years of teaching here has come down to this . . . well, it's tragic, both personally and professionally. It isn't what I'd like but it is something I feel I must do.

Jim, you mentioned in our Friday meeting that perhaps I was making a "martyr" of myself. But for what? No, I'm *not* martyring myself by doing this; people — both the good and the not-so — leave their jobs when they feel they must (though some of the not-so-good find ways of staying on past their prime — and at FAMU, as elsewhere I suspect, the academic process of tenure is compromised enough by politics to allow that to happen).

Were I *not* to leave now, what assurances are there that my application (again) for tenure here would be objectively reviewed and considered without bias of any kind, as indeed it should be?

I do not see how, given the major important responsibilities I've been asked (and had agreed) to assume recently pertaining to retention and reaccreditation, I can assemble an application for tenure strong enough to overcome any lingering prejudices and those now arising from this latest incident. Thus, as I see

Appendix H

it, my days at FAMU are numbered anyway, so it makes more sense to leave now voluntarily than to be "cut loose" later.

No, I'm certainly not a martyr here. Just greatly overworked. And as I said Friday, some can continue on that basis but I cannot. You need a "fresh" teacher here, and I'm sure our students would better appreciate one who is younger, black and female. Marilyn Kern-Foxworth will be more to their liking.

Let me be clear about this: I'm not leaving to take a better job somewhere else. I have no offers, nor have I been seeking any. My hope was to someday *retire* from Florida A&M, not resign from this great University. No, if anything, I'm doing what I feel I must do now to preserve my physical and mental well-being.

This is, in a way, putting myself on medical leave, but permanently. I just wish I didn't have to severe my ties to — and employment by — the University to accomplish that what is needed now.

University officials may want to bring action (e.g., a breach-of-contract suit) against me, but I don't wish to see any such dispute made public or met with formal counter claims. The extent to which this may get "messy" is up to you — and them.

Finally, let me say, as I did last Friday, that I'm resigning because I see no other way of resolving the new and not-so new dilemmas attendant to my continued presence here. However, if you two — or others — see some other solution, I'd be more than happy to hear and consider it at this time.

/s/ Gerry

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No. 98-44

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

GERALD GEE,

Petitioner,

v.

FREDERICK HUMPHRIES, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Eleventh Circuit

REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY BRIEF

Petitioner submits this brief in reply to the brief in opposition ("Opp. Br.") of respondents Humphries, *et al.* Respondents make a number of new points in opposition to the petition; they are either self-refuting or easily rebutted.

A. RESPONDENTS' FACTUAL ASSERTIONS

Respondents' opposition is filled with mischaracterizations of the record; suffice it to note that Gee disputes them and they are irrelevant. The primary factual assertion that respondents make is that the purpose of Gee's speech was not pedagogic, as he claims, but rather "to insult the students as poorly motivated or too lazy to solve th[e] problem" and "to silence their complaining which implicated his own inattention to this problem" (Opp. Br. 1). To enhance this point, respondents misparaphrase the actual speech,[1] redefine its context,[2] and ignore the testimony of their own investigator that she took only what was "common" among the versions of what happened in making *her* determination (*see* Pet. 8) -- the one that President Humphries relied upon in suspending Gee. Plainly, Gee's version of these events did not assert that

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[1] *Compare* Opp. Br. 5 ("the sort of thinking that can keep *us all* on the back of the bus forever" (quoting record) (emphasis added)) *with* Opp. Br. 11 (Gee said "that would keep *them* on the back of the bus" (emphasis added)), 13 (Gee said mentality "was responsible for keeping *the listeners* on the 'back of the bus forever'" (emphasis added)).

[2] Respondents several times suggest that the speech was a private conversation with just a few students. Opp. Br. 11 ("a pre-class conversation with a few students"), 14 (Gee "and a few students were waiting for the commencement of class"). *All* of the complaints that commenced Gavin's investigation of Gee described it as an open class discussion among a number of students (Petition App. E2, E6, E7, and E10), as did Gavin herself in her report (Petition App. J4).

he wanted to insult or silence his students (Pet. App. I), and it would have been rather odd had Gavin actually reached any conclusion about Gee's purpose since she never interviewed Gee at all during her investigation. R.20, p. 41.

In any event, respondents never really make it clear why some uses of the term "nigger" are pedagogic and some are "insults." They simply assert *ipse dixit* that Gee's statement was the latter, and the other uses of the term in the record (*see* Pet. 4-5) were the former. Opp. Br. 10-11. That is hardly the kind of clear explanation normally associated with the term "fair notice."

B. RESPONDENTS' LEGAL ASSERTIONS

Gee was suspended for two weeks because of what he said in class.[3] Nonetheless, respondents claim that this is "not a free speech case at all" (Opp. Br. 12). Their efforts to ignore conflicts among the circuits on the various issues outlined in the petition are similarly far-fetched.

1. First Amendment Issues. -- Gee has shown that the circuits have split on the application of the "public concern" test for in-class or pedagogic speech. Respondents assert that Gee's speech was not pedagogic, and then cite a series of cases plainly involving speech outside of the classroom to show that the conflict does not really

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[3] Respondents go to great lengths to show that Gee's career was in a tailspin and that he would not have received tenure in any event. Opp. Br. 2-3. This, of course, is both disputed and irrelevant to any issue on which Gee seeks review. No one disputes that there was a causal relationship between Gee's speech and (1) his suspension and (2) the report in his file finding him guilty of racial harassment.

exist. None of the cases from the First, Sixth or Tenth Circuits cited in the paragraph on pages 14-15 of respondents' brief involved in-class, pedagogic speech; and no one disputes that the "public concern" test has been applied to non-pedagogic, outside-the-classroom speech.

Thus, respondents' assertion that this case is inappropriate to resolve the conflict about *in-class* speech is dependent upon their assertion that Gee's speech was not pedagogic. Not only is this an inappropriately narrow definition of "pedagogy," it once again, ignores Gavin's own report. Pet. App. J4 ("It was common for the students to discuss topics that concerned them, whether those topics were a part of the lecture or not").

Respondents also assert that the "legitimate pedagogical concern" test in the First Circuit is the same as the "public concern" test applied elsewhere (and thus there is no conflict). Opp. Br. 15-16. *See also id.* at 20 (if speech could not meet "public concern" test, it could not have met "legitimate pedagogical concern" test of *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)). But this is just plain wrong. The "public concern" test is a test applied to the *speech itself*, to determine if it is at all protected; it weighs the *public employee's* interest. The "legitimate pedagogical concern" test is a test applied to *regulations of speech* by a school; it weighs the *school's* (or the *State's*) interest. They are separate tests, and their co-existence hardly disproves the fact of a conflict in the application of one of them.

With respect to the "fair notice" requirement of the First Amendment, respondents claim that there is no conflict between the decision of the court below and the Ninth Circuit's decision in *Cohen v. San Bernardino Valley*

College, 92 F.3d 968 (9th Cir. 1996) because the latter turned upon "a unique set of facts." Opp. Br. 18. Specifically, respondents assert that the court in *Cohen*

> noted that the University had *permitted* the instructor to teach in this manner for years without a finding that this conduct was in violation of the rule. The court was critical of the change in enforcement and the inconsistent interpretation of the rule.

Opp. Br. 18 (emphasis added). One can search in vain in *Cohen* for anything resembling these assertions because respondents have simply made them up. In fact, the repeated, long-term conduct involved in *Cohen* suggests, if anything, that the conduct should have been far more likely to be characterized as "severe" and "pervasive." That the Ninth Circuit held that it did not clearly come within the school's definition of "sexual harassment" only underscores the conflict between that case and this one.

Finally, respondents assert that this Court can ignore the different balancing tests of *Pickering* and *Hazelwood* being applied by the lower courts because Gee "failed the *Pickering* balancing test" (Opp. Br. 20). But neither of the Courts below reached any balancing test.

2. Procedural Due Process. -- Respondents spend much effort demonstrating that Gee did, in fact, have additional state remedies after President Humphries suspended him (with less than one week's notice). Opp. Br. 21-23. Gee obviously disputes that (*see* Pet. 29 n.9), but it is once again irrelevant to the question he has asked: assuming he did have such options, is the State deprivation of property "incomplete" until he has used all of them?

Respondents' efforts to show that there is no conflict among the circuits on this question are frivolous. Indeed, their primary argument seems to be that the Eleventh Circuit's decisions[4] have *not* applied the "random" and "unauthorized" limitation on *Parratt v. Taylor*, 451 U.S. 527 (1981) that the other circuits (and this Court) have applied. *E.g.*, Opp. Br. 26 ("the court in *McKinney* made absolutely no reference to [the "random" and "unauthorized"] distinction, nor did it make this a basis of its decision"), 28 ("whether the *Parratt* analysis applies to actions by high ranking officials acting within the scope of their authority . . . was not mentioned by the Eleventh Circuit in *McKinney*"). That the Eleventh Circuit ignores standards that other circuits deem relevant is a powerful argument *for* granting Gee's petition, not against it.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the petition, this Court should grant the petition.

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[4] It is unclear what point respondents wish to make with their argument that cases in the Eleventh Circuit subsequent to *McKinney v. Pate* (including this one) did not expand, but simply applied, that precedent. Opp. Br. 23-24. In either case, the Eleventh Circuit requires a plaintiff to utilize all possible state remedies before a deprivation of property is deemed to have been by the state. Whether that is called an "exhaustion" requirement or something else (Opp. Br. 24) hardly changes the substantive result.